LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 16 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1033~~ 70-288

A. ZERKOWITZ & CO. INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Donald W. Paley
Eugene F. Blauvelt
Gail T. Cumins
Counsel for the Petitioner

SHARRETTS, PALEY, CARTER & BLAUVELT
80 Broad Street
New York, N. Y. 10004

John F. Davis
Of Counsel

June 1971

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	9

APPENDICES

APPENDIX A – Opinion of Court of Customs and Patent Appeals on Rehearing	1a
APPENDIX B – Opinion of Court of Customs and Patent Appeals	3a
APPENDIX C – Opinion of Customs Court, Second Division, Appellate Term	14a
APPENDIX D – Opinion of Customs Court	49a

STATUTES INVOLVED

19 U.S.C. 1336 (Section 336)	2, 5, 6, 7, 8
19 U.S.C. 1352 (Section 350(a))	4, 5, 7, 8
19 U.S.C. 1402 (Section 402a)	4, 5, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No.

A. ZERKOWITZ & CO. INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioner, A. Zerkowitz & Co. Inc., respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Customs and Patent Appeals entered in this proceeding.

OPINIONS BELOW

The opinions of the Court of Customs and Patent Appeals (pp. 1a, 3a, *infra*) are reported in 5 Customs Bulletin Nos. 3 and 4, C.A.D. 1005. The Opinion of the Customs Court, appellate term (p. 14a, *infra*) is reported in 62 Cust. Ct. 986, 297 Fed. Supp. 350. The decision of the single judge (p. 49a, *infra*) is reported in 55 Cust. Ct. 643 (R.D. 11095).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on December 30, 1970. Petition for rehearing was timely filed, but was denied on March 18, 1971 (p. 1a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1256.

QUESTION PRESENTED

Whether a rate of duty fixed pursuant to the Foreign Trade Agreements Act of 1934, as amended in 1947, and a Japanese Trade Agreement adopted thereunder was properly assessed on the valuation basis of "American selling price" which had been placed in effect under a provision of the Tariff Act of 1930 intended to equalize manufacturing costs, in spite of the fact that the Foreign Trade Agreements Act specifically exempts imports subject to trade agreements from that section of the law and such a basis of valuation is otherwise impermissible.

STATUTORY PROVISIONS

SECTION 336 (19 U.S.C. Section 1336)

Equalization of Costs of Production Change of Classification or Duties

"(a) In order to put into force and effect the policy of Congress by this chapter intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the prin-

cipal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

Change to American Selling Price

"(b) If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

Proclamation by the President

"(c) The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

Effective Date of Rates and Changes

"(d) Commencing thirty days after the date of any presidential proclamation of approval the increased or decreased rates of duty and changes in classification or in basis of value specified in the report of the commission shall take effect.

* * *

Modification of Changes in Duty

"(f) Any increased or decreased rate of duty or change in classification or in basis of value which has taken effect

as above provided may be modified or terminated in the same manner and subject to the same conditions and limitations (including time of taking effect) as is provided in this section in the case of original increases, decreases, or changes."

SECTION 350 (a) (19 U.S.C. Section 1352)

"(a) The provisions of section 1336 of this title shall not apply to any article with respect to the importation of which into the United States a foreign-trade agreement has been concluded pursuant to this part, or to any provision of any such agreement. * * *"

SECTION 402a (19 U.S.C. section 1402)

Value (Alternative)

"(a) *Basis.*—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

(4) In the case of an article with respect to which there is in effect under section 336 a rate of duty based upon the American selling price of a domestic article, then the American selling price of such article.

STATEMENT OF THE CASE

The issue upon which the petitioner seeks certiorari is a pure question of law determined by an application of the statutes involved so that reference to the rather extended record before the courts below is not required. The facts set forth in the opinions of the two lower courts will suf-

fice to answer the question of whether "American selling price" was a proper basis for appraisement.

Zerkowitz imported rubber-soled tennis shoes from Japan during the years 1958, 1959 and 1960. It is not disputed that shoes of this type are subject to a rate of duty (20 per centum ad valorem) under paragraph 1530(e) Tariff Act of 1930 as amended by the trade agreement with Japan which became effective by Presidential Proclamation on and after July 24, 1955, as reported in Treasury Decision 53865.

The imported shoes were appraised upon the basis of the American selling price of a domestically produced shoe under the alleged authority of a Tariff Commission recommendation, approved by the President, under Section 336, Tariff Act of 1930 and pursuant to a note in the agreement purporting to make that provision applicable. The Tariff Commission recommendations had become effective, as provided in Section 336(d), on and after March 3, 1933.

Petitioner submits that, by reason of the specific statutory provision contained in Section 350 of the Tariff Act of 1930 as amended (19 U.S.C. Section 1352), the inclusion of this type of shoe in the trade agreement with Japan rendered inoperative the Section 336 rate of duty and appraisement upon the basis of American selling price which had become effective in 1933.

Petitioner also submits that Section 402, Tariff Act of 1930, 19 U.S.C. Section 1402, only provides for appraisement on the basis of American selling price if in respect to the imported article, there is in effect, under Section 336, 19 U.S.C. 1336, a rate of duty based upon American selling price.

After extensive proceedings a judge of the Customs Court ruled that the appraisal was proper (p. 80a, *infra*). On application for review of that decision a three judge panel of the same court affirmed that ruling, one judge dissenting (p. 31a, *infra*). On appeal to the Court of Customs and Patent Appeals, the decision of the lower court on this issue was

affirmed and on application for rehearing by the United States, the application was denied, but a clarifying opinion issued (p. 1a, *infra*). Unless the United States seeks review here, the issues involved in the petition for rehearing will not be before this Court for decision.

REASONS FOR GRANTING THE WRIT

In order to understand why the issue here is important far beyond the dollar amount involved in this case and the 16,153 other value cases depending on its final decision,[1] it is necessary to consider briefly the purposes of the statutory provisions involved.

Section 336, Tariff Act of 1930, authorized the imposition of an ad valorem rate of duty based upon American selling price if the Tariff Commission, after due notice and public hearings, determined that this was the only way differences in cost of production could be equalized. The only part played by the President, under Section 336, was to approve the Tariff Commission's recommendations. In other words, the President could exercise a veto if he did not approve. Once he did approve, the statute provides that the rate of duty and the basis of valuation recommended by the Commission would become effective and would continue unless a new proceeding, hearing, recommendation and Presidential approval providing for a different rate of duty and a different basis of valuation became effective as provided in Subsection (f) of Section 336.

The purpose of Congress in enacting Section 336 is clearly set forth in the statute itself, i.e., to equalize differences in the cost of production of imported articles and similar articles produced in the United States.

---

[1] The Clerk of the U.S. Customs Court reported on March 1, 1971, that court action on 16,153 value cases had been suspended pending the final decision in this case.

The purpose of Congress in enacting Section 350 some four years *after* the enactment of Section 336 was completely different and, generally, opposed to that expressed in Section 336. In 1934, the free traders who had been out-voted when the Tariff Act of 1930 was enacted on June 17th of that year, now enacted the Reciprocal Trade Agreements Act with the explicit purpose of allowing the President to enter into agreements with foreign countries by changing our tariff rates on a *quid pro quo* basis for a lowering of foreign rates on American exports.

Thus, the purpose of Section 336 was to try to provide that foreign products would pay a duty sufficient to insure that their sale price to the United States would, at least, be equal to the cost of production of similar articles produced in the United States. On the other hand, the purpose of Section 350 was to negotiate lower foreign rates of duty so as to increase American exports. This was to be accomplished by offering lower United States duties which presumably would increase imports into the United States.

Because Congress recognized the inconsistency between the two laws, it provided that any imported article, the subject of a trade agreement, would not be subject to the provisions of Section 336.

In 1934, when Section 350 was enacted as an amendment to the Tariff Act of 1930, there were over fifty commodities subject to Section 336 rates of duty. Congress apparently did not wish to exclude such commodities from the operation of future trade agreements and so provided that the provisions of Section 336 " * * * shall not apply to any article with respect to the importation of which into the United States a foreign trade agreement has been concluded * * *."

This case involves the reconciliation of these opposing principles in their application to a determination of the value upon which a rate of duty payable on tennis shoes imported from Japan is to be assessed.

The government argues, and the court below held, that the exception from Section 336 provided by Section 350 applies only to prevent using the American selling price for an item after it had become the subject of a reciprocal trade treaty, but not to a prior determination. Certainly there is nothing in the language of the section to support such an interpretation. The law reads: "The provisions of section 1336 of this title shall not apply to any article with respect to the importation of which into the United States a foreign-trade agreement has been concluded pursuant to this part, or to any provision of any such agreement. * * *" Moreover, since the purpose of using the American selling price formula, to equalize production costs, has no reasonable relationship to a duty fixed under a treaty intended to encourage international trade, there can be no reason to give the language an interpretation beyond its simple and direct meaning. Nor can the fact that the treaty itself contained a note attempting to apply the basis of appraisal provided in Section 336 affect the direct prohibition enacted by Congress to permit assessment on the basis of an artificial value entirely unrelated to the actual value of the items involved.

Once it is understood that Section 336 does not authorize using American selling price as the basis for the duty, Section 402(a) (19 U.S.C. 1402), makes it clear that the Act does not otherwise authorize the use of that basis. That section sets forth the permissible bases for the application of rates of duties and provides in Subsection 4 for the use of American selling price only when "there is in effect under Section 336 a rate of duty" on that basis. The courts below recognized that the Japanese treaty reduced that rate from 35% to 20%, but held that this was a mere suspension, not a repeal of the prior rate. Even assuming that this is so, the statute addresses itself to whether the rate under Section 1336 is *in effect.* It is respectfully submitted that a rate which is suspended is not in effect whether the suspension be temporary or permanent.

The petitioner recognizes the infrequency with which the Court has granted review of decisions of the Court of Customs and Patent Appeals. However, here is a case which involves not merely the intepretation of the statutory provisions imposing duties on tennis shoes from Japan, nor merely the general application of the other provisions of the Tariff Act to trade agreements, but in truth a reconciliation of two basic policies of the Congress in its attempt both to protect American industry and to foster international trade. In such a case, the Supreme Court, not the Court of Customs and Patent Appeals, should finally determine the issue.

CONCLUSION

For all of the foregoing reasons, this petition should be granted.

Respectfully submitted,

Donald W. Paley
Eugene F. Blauvelt
Gail T. Cumins
Counsel for Petitioner

John F. Davis
Of Counsel

APPENDIX A

COURT OF CUSTOMS AND PATENT APPEALS

Footwear—On petition for rehearing: Treated as petition for clarification

A. ZERKOWITZ & CO., INC. v. THE UNITED STATES No. 5348

United States Court of Customs and Patent Appeals, March 18, 1971

Appeal from United States Customs Court, A.R.D. 250

[On Petition for Rehearing: Treated as petition for clarification.]

Sharretts, Paley, Carter and Blauvelt, attorneys of record, for appellant. *Eugene F. Blauvelt, Gail T. Cumins*, of counsel.

William D. Ruckelshaus, Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Frederick L. Ikenson* for the United States.

Lamb & Lerch, Amici Curiae, *David A. Golden*, of Counsel.

[Oral argument October 6, 1970 by Miss Cumins and Mr. Ikenson]

Before RICH, ALMOND, BALDWIN, LANE, *Associate Judges*, and MCMANUS, *Judge*, Northern District of Iowa, sitting by designation

PER CURIAM:

Because appellee's petition for rehearing exhibits considerable misunderstanding of the effect of our decision in this case, we will treat it as a petition for clarification. However, as a petition for rehearing, it is *denied*.

Broadly speaking, there were two issues in this case, namely, whether it was proper to attempt an American selling price appraisement and whether the attempted American selling price appraisement was properly effected. We decided that it was proper to attempt an American selling price appraisement, but that the record indicated that a proper American selling pric appraisement could have been but was not effected in all cases in that at least some of the imported shoes were appraised on the basis of the American selling price of domestic shoes which were not legally "similar."

While we could have held the importer precluded from further litigation on the basis that it could have proved but did not prove which domestic shoes, other than the Rovers, were "similar" to the imported shoes at the time of their exportation, we did not do so because, in view of the complexities of the case, the equities seemed to dictate that the importer be given another chance to prove facts the relevancy of which was clearly not appreciated below.

To allay appellee's fears, we emphasize that, even though we decided that at least some of the shoes were incorrectly appraised, the burden is still on appellant to prove the basis of an alternative appraisement, *United States* v. *New York Merchandise Co.*, C.A.D. 1004, 5 Cust.

Bull. & Dec. No. 1, pp. 4, 7–8 (Dec. 17, 1970), which must be on the basis of the American selling price of some domestic shoe. Thus, if the importer wishes to have those shoes which were incorrectly appraised on the basis of legally dissimilar Rover shoes reappraised on the basis of some other shoe, it will now be up to it to prove which shoe that should be—failing which, the appraisement will stand.

APPENDIX B

COURT OF CUSTOMS AND PATENT APPEALS

(C.A.D. 1005)

Footwear

A. ZERKOWITZ & Co., INC. *v.* THE UNITED STATES No. 5348

United States Court of Customs and Patent Appeals, December 30, 1970

Appeal from the United States Customs Court, A.R.D. 250

[Remanded.]

Sharretts, Paley, Carter and Blauvelt, attorneys of record, for appellant. *Eugene F. Blauvelt, Gail T. Cumins*, of counsel.

William D. Ruckelshaus, Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Frederick L. Ikenson* for the United States.

Lamb & Lerch, Amici Curiae, *David A. Golden*, of counsel.

[Oral argument October 6, 1970 by Miss Cumins and Mr. Ikenson]

Before RICH, ALMOND, BALDWIN, LANE, *Associate Judges*, and MCMANUS, *Judge*, Northern District of Iowa, sitting by designation.

RICH, *Judge*, delivered the opinion of the court:

This appeal is from the judgment of the United States Customs Court, Second Division, Appellate Term (one judge dissenting in part), 62 Cust. Ct. 986 and 297 F. Supp. 350 (A.R.D. 250), affirming the judgment of a single judge sitting in reappraisement, 55 Cust. Ct. 643 (R.D. 11095). The imported goods are tennis shoes imported from Japan during the years 1958, 1959, and 1960. Both at trial and on appeal they were held properly appraised on the basis of the American selling price, as defined in 19 USC 1402(g), of tennis shoes manufactured by the United States Rubber Company and sold as the U.S. Keds "Rover." We remand.

There are three issues. The first is whether inclusion of the imported merchandise in concessions to the Japanese in our 1955 trade agreement with Japan made improper its appraisement on the basis of the American selling price of like or similar domestic articles. The second issue,

which we reach because we agree with the conclusion below on the first issue, is whether the use of the U.S. Keds "Rover" tennis shoes as the basis for the American selling price appraisement made below was proper. The third issue, which we reach because we find that not all the domestic tennis shoes used as the basis for the appraisement below were legally "similar" to the imported tennis shoes, is whether any other domestic tennis shoes could have been used as the basis for an American selling price appraisement.

I. *Propriety of the Basis of Appraisement*

The imported footwear is admittedly classifiable under paragraph 1530(e) of the Tariff Act of 1930, as amended, at a rate of 20% ad valorem. The question is valuation. Zerkowitz concedes that prior to the effective date of the 1955 trade agreement with Japan these goods were properly appraised on the basis of the American selling price of like or similar domestic articles by virtue of Presidential Proclamation No. 2027 (T.D. 46158; 63 Treas. Dec. 232), duly promulgated under the provisions of 19 USC 1336. Subsection (a) of section 1336, headed "Equalization of Costs of Production—Change of Classification or Duties," authorized the Tariff Commission to "investigate the differences in the costs of production of any domestic article and of any like or similar foreign article," and if it found "that the duties expressly fixed by statute * * * [did] not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country," the commission was to report to the President "such increases or decreases in rates of duty expressly fixed by statute * * * as it * * * [found] * * * to be necessary to equalize such differences," with the added constraint that in no case should the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute. However, if it found that the differences in the foreign and domestic costs of production could not be equalized by the mechanism provided in subsection (a), subsection (b) authorized the commission to so state in its report to the President and to "specify therein such ad valorem rates of duty based upon the American selling price of the domestic article, as it * * * [found] * * * to be necessary to equalize such differences," with the added constraints, first, that in no case should the total decrease of rates of duty exceed 50 per centum of the rates fixed by statute, and, second, that no such rate should be increased. The President was then authorized by subsection (c) to "approve" the rates of duty and changes in the basis of value specified by the commission "if in his judgment such rates of duty and changes are shown

by such investigation of the commission to be necessary to equalize such differences in costs of production." Proclamation No. 2027, supra, was so made.

However, Zerkowitz contends that subsection 1352(a) of 19 USC removed the disputed goods from the purview of section 1336 and that section 1402(a) of 19 USC, which sets forth the five possible bases upon which the imported tennis shoes might have been appraised, only authorized appraisement on the basis of the American selling price of a like or similar domestic article when the rate of duty applied to the imported goods was one in effect as the result of a section 1336 proceeding.

The portion of 19 USC 1352(a) on which Zerkowitz relies reads:

> The provisions of section 1336 of this title shall not apply to any article with respect to the importation of which into the United States a foreign-trade agreement has been concluded pursuant to this part * * *.

A foreign-trade agreement with respect to the importation into the United States of the merchandise in suit had been concluded. Therefore, Zerkowitz contends, section 1336 was not applicable to the merchandise in suit, and, since 19 USC 1402(a), read in conjunction with 19 USC 1402(g), only authorized appraisement on the basis of American selling price "In the case of an article with respect to which there is in effect *under section 336* [19 USC 1336] a rate of duty based upon the American selling price of a domestic article * * *" (emphasis ours), the appraisement of the merchandise in suit on an American selling price basis was not authorized.

The Appellate Term of the Customs Court held that the above-quoted portion of 19 USC 1352(a)

> addresses itself solely to the use of section 1336 as a *procedural device*, and that what is intended by the language above noted is the barring of the use of that statutory procedure in derogation of the operation of a trade agreement concluded pursuant to section 1351. To admit of the broad construction of section 1352 for which appellant contends would, in our view, require the addition of language to that above noted so as to make the statute applicable not only to the provisions of section 1336 of this title, but to make it also applicable to the customs treatment of articles pursuant thereto. [Emphasis in the original.]

With that conclusion we agree. The controverted portion of 19 USC 1352(a) is prospective, barring use of the section 1336 procedures to undo what has been done by a foreign-trade agreement; it does not, in itself, nullify changes in rates of duty, classification, or bases of appraisement brought about by previous use of the section 1336 procedures.

However, this conclusion does not settle the issue. Section 1402 only authorized appraisement on the basis of American selling price "In the case of an article with respect to which there is *in effect* under section 336 [19 USC 1336] a rate of duty based upon the American selling price of a domestic article" (emphasis ours), and, since in this case the rate of duty originally set by a section 1336 proceeding was no longer being collected, having been superceded by a rate of duty set by the foreign-trade agreement with Japan, Zerkowitz contends that there was no rate of duty based upon the American selling price of a domestic article "in effect under section 336" when the goods here in issue were imported.

The Appellate Term relied on reasoning similar to that which we employed in *Barclay & Co.* v. *United States*, 47 CCPA 133, C.A.D. 745 (1960), to meet this argument, holding that

> * * * section 1336 was at best only suspended,[1] and this, *pro tanto* to the extent of the duty rate, leaving intact the basis of valuation of the merchandise affected by section 1336.

Again, we agree with the conclusion reached below. In *Barclay* the rate of duty levied on certain imported goods had been set, successively, by the Tariff Act of 1930 simpliciter (30%), by a proclamation issued under authority of 19 USC 1336(a) (45%), and by a proclamation implementing a foreign-trade agreement issued under authority of 19 USC 1351 (22½%). When the second proclamation was terminated by still a third proclamation, we ruled that the rate of duty reverted to that specified in the first proclamation (45%) rather than to that specified in the statute (30%), holding "that the second proclamation did not abrogate the first but merely suspended it, and that repeal of the second operated to restore the first." Id. at 135. The *Barclay* decision in turn relied on two earlier cases[2] holding that upon the recission of a second section 1351 proclamation which had superseded a previous section 1351 proclamation, the original section 1351 proclamation controlled tariff treatment of the subject merchandise. Although these cases are all distinguishable on the facts in that different sequences and combinations of section 1336 proclamations and section 1351 proclamations were involved, we think that a common legal principle runs through all of them. The promulgation of successive proclamations under sections 1336 and 1351 of 19 USC does not, in itself, abrogate previous proclamations, but merely sus-

[1] What the lower court meant by "section 1336 was * * * suspended" was, of course, that the tariff consequences of the proceeding undertaken pursuant to section 1336(b) (the change in the basis of valuation and the continuation of the pre-existing rate of duty) were suspended, not that section 1336 itself was suspended.

[2] *United States* v. *Metropolitan Petroleum Corp.*, 42 CCPA 38, C.A.D. 567 (1954), and *United States* v. *American Bitumuls & Asphalt Co.*, 44 CCPA 199, 246 F. 2d 270, C.A.D. 661 (1957).

pends them. Accordingly, at the time the goods here in issue were imported there was "in effect under section 336 [19 USC 1336] a rate of duty based upon the American selling price of a domestic article," and it was thus proper to appraise them under 19 USC 1402(g) on the basis of the American selling price of a like or similar domestic article.

II. *Propriety of the Instant Appraisement*

The imported footwear was appraised on the basis of the American selling price of the United States Rubber Company's U.S. Keds "Rover" tennis shoes pursuant to determinations: (1) that the domestic shoes were "similar" [3] to the imported shoes within the meaning of that word in 19 USC 1336 and (2) that the American selling price of the domestic shoes had been determined in the manner specified by 19 USC 1402(g). Holding that the lower court erred in giving too broad a scope to the word "similar," we remand for further determinations as to the first point ("A" infra), but we agree with the conclusion below as to the second point ("B" infra).

A. *Were the Domestic Shoes Similar?*

In finding the requisite similarity between the imported and domestic footwear, the court below relied primarily on two cases, *Japan Import Co.* v. *United States*, 2 Cust. Ct. 926, R.D. 4568 (1939), and *Albert F. Maurer Co.* v. *United States*, 51 CCPA 114, C.A.D. 845 (1964). From the former case it adopted the following four subtests: (1) similarity of material, (2) commercial interchangeability, (3) adaptability to the same use, and (4) competitive character. From the latter case it seems to have concluded that of the four subtests, that of competitiveness is preeminent. Nevertheless, it made findings of fact on all four subtests, declaring that the foreign and domestic shoes "were made of similar material, were of similar construction, had substantially the same uses and purposes,[4] and would compete for purchase by many of the same persons."

There can, of course, be no question that this court has jurisdiction to review the ultimate determination of "similarity" made by the court below, for as we previously expressly held in *Maurer*, supra (at p. 116), whether imported and domestic articles are "similar" within the meaning of 19 USC 1336 is a question of law. However, the subtests upon which the lower court relied are more nearly questions of fact,

[3] The Government does not contend that the domestic shoes are "like" the imported shoes.

[4] The second and third subtests the lower court had considered together on the ground that "it is obvious that in an article such as this [,] commercial interchangeability would in fact be based upon use."

and this court has long held that the findings of fact of an Appellate Term of the Customs Court in a reappraisement case will not be disturbed if there is "any substantial evidence" [5] in support of those findings. *Japan Import Co.* v. *United States*, 24 CCPA 167, 175, 86 F. 2d 124, 131, T.D. 48642 (1936); *A. N. Deringer, Inc.* v. *United States*, 53 CCPA 135, 137, C.A.D. 890 (1966). This we take to mean that it has been the rule that such findings should not be distburbed even though they are "clearly contrary to the weight of the evidence." This rule has not been challenged here,[6] and we accordingly proceed on the assumption that the lower court's factual determinations supporting its legal conclusions of "similarity" may be disturbed only if unsupported by "any substantial evidence," or, of course, if predicated upon an incorrect interpretation of law.

The chief point relied upon by Zerkowitz to establish legal dissimilarity between the imported tennis shoes and the domestic shoes used as the basis of the American selling price appraisal is a difference of material and construction. The U.S. Keds "Rover" tennis shoes sold from the year 1959 on contained cushioned insoles and shock-absorbing arch cushions which, Zerkowitz argues, made them so dissimilar in material and construction to the imported shoes that they were not "similar" thereto within the meaning of 19 USC 1336.[7] Judge Richardson disagreed with his brethren on this point, among others, and we are persuaded that the majority did, in fact, apply the wrong legal standards in arriving at their determination of "similarity of material."

While we agree with the majority below that the *Maurer* case found that goods may be "similar" within the meaning of 19 USC 1336 although they are dissimilar in many details, we agree with the dissenting judge that the "policy considerations" which compel a finding of legal similarity between competing goods dissimilar in structural detail do not "require a finding of similarity within the meaning of the statute merely because the foreign and domestic items fall within

---

[5] We have defined "substantial evidence" in this context as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Brooks Paper Co.* v. *United States*, 40 CCPA 38, 45, C.A.D. 495 (1952). The word "any," though constantly quoted as modifying the words "substantial evidence," does not seem to have affected the application of the rule in any way.

[6] Indeed, appellant's brief contends only that the Appellate Term's findings of fact on this issue were "contrary to the preponderance of evidence." We regard this as an obvious slip of the pen, rather than as a tacit admission that the Appellate Term's findings did *not* constitute reversible error, because appellant urges the contrary.

[7] Appellant also argues that the imported tennis shoes and the "Rover" tennis shoes were dissimilar at all times in that (1) the imported shoes have a patented sole which renders them more skid resistant than the domestic shoes and (2) the sole and the canvass in the uppers of the imported shoes are lighter and less durable than those in the domestic shoes. However, we agree with the lower court that these differences are immaterial. Cf. *Albert F. Maurer Co.* v. *United States*, cited supra and discussed infra.

the same broad use classification." In this case the imported and domestic footwear may look alike, as the trial judge wrote, but even the cursory examination to which consumers might be expected to subject them, let alone the expert, technical examinations evidence of which was introduced in this case, reveals that at least some of the imported shoes are markedly inferior in quality to the domestic shoes to which they were adjudged "similar" in that they lack cushioned insoles and arch supports. We cannot agree with the trial judge, whose reasoning on this point was adopted by the Appellate Term, that the imported tennis shoe is "competitive" with the domestic shoe, and therefore "similar" to it, because it is, percentagewise, even cheaper than it is inferior. There can be no doubt, to paraphrase Judge Richardson's dissent, that a relatively cheap Ford Falcon and a relatively expensive General Motors Corporation Cadillac are "competing" goods in the broad sense that both are used for private transportation and that in many cases the purchase of one for that purpose precludes the purchase of the other for the same purpose, but that is clearly not the kind of competition we were writing about in *Maurer*. Compare *United States* v. *F. Vietor & Achelis*, 17 CCPA 412, 416, T.D. 43864 (1930).

As we wrote in Maurer, the "flexible tariff" mechanism seems to have been designed to protect articles of domestic manufacture "where imports are sufficiently similar to American goods *to compete directly* with them," id. at 119 (emphasis supplied); it seems highly unlikely that it was intended to protect manufacturers of domestic goods as dissimilar to the imported goods as are the United States Rubber Company's post-1959 U.S. Keds "Rover" tennis shoes. So construed, similarity under 19 USC 1336 is, as our predecessor court wrote in *United States* v. *Wecker & Co.*, 16 Ct. Cust. Appls. 220 225, T.D. 42837 (1928),

> * * * to be measured by much the same homely rule that applies to the prospective customer who enters a store seeking some utilitarian article of a certain specified name and style; he finds the article requested is not in stock but that another article, of approximately the same price and which will perform the same functions, is capable of the same use and may be substituted therefor, is available. Such an article is a similar article, notwithstanding the price, the methods of construction, and the component materials may be somewhat different; but, for all utilitarian purposes, one is a substitute for the other.

And, we would now add, it is approximately what the customer wanted and acceptable to him as a substitute.

However, not all of the imported shoes lacked cushioned insoles and arch supports, and the U.S. Keds "Rover" also lacked cushioned

insoles and arch supports before some date in the summer of 1959. As Judge Richardson's dissenting opinion amply demonstrates, the record on this point is confused, undoubtedly because neither the appraiser nor the trial judge thought this difference sufficiently significant to render the domestic and imported shoes legally "dissimilar." Accordingly, we remand for the purpose of permitting the lower court to determine which, if any, importations of the Japanese tennis shoes, *at the time of exportation of the imported articles*, were "similar" to the domestically manufactured "Rover" being sold for domestic consumption and which were not.[8]

B. *Was the American Selling Price of the Domestic Shoe Determined in the Manner Specified by 19 USC 1402(g)?*

Even though there was the requisite legal "similarity" between at least some of the imported tennis shoes and the U.S. Keds "Rover" tennis shoes on the basis of whose American selling price they were appraised, the appraisement was still proper only if the American selling price of the "Rover" tennis shoes was determined in the manner specified by 19 USC 1402(g). As the trial judge correctly pointed out, this subsection permits the determination of American selling price three different ways:

> 1. By the price at which the domestic article is freely offered for sale for domestic consumption to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities, or
> 2. By the price that the manufacturer, producer, or owner would have received for such merchandise when sold for domestic consumption in the ordinary course of trade and in the usual wholesale quantities, or
> 3. By the price that the manufacturer, producer, or owner was willing to receive for such merchandise when sold for domestic consumption in the ordinary course of trade and in the usual wholesale quantities.

Both courts below found that the "Rover" tennis shoes satisfied all three criteria, and the Government has argued here, in effect, that

---

[8] We note that Judge Richardson objected to the appraisement of certain importations of the Japanese tennis shoes on the basis of the American selling price of certain models of the "Rover" on the ground that other "Rover" shoes were more similar. The Customs Court has twice held that, if a "like" domestic article exists, its American selling price must be used in making these appraisements in preference to that of a "similar" domestic article. *Hoyt, Shepston & Sciaroni* v. *United States*, 38 Cust. Ct. 741, A.R.D. 74 (1957), appeal dismissed, 45 CCPA 129 (1957); *Geo. S. Bush & Co.* v. *United States*, 48 Cust. Ct. 689, A.R.D. 140 (1962), appeal dismissed, 49 CCPA 139 (1962). However, as far as we are aware, no court has ever ruled that the American selling price of a "more similar" domestic article must be used in preference to that of a "less similar" domestic article; in fact, the *Hoyt, Shepston* opinion expressly leaves the question open. Appellant has neither argued the existence of such an implied standard nor attacked the validity of this provision as the grant of unregulated authority in the absence of such an implied standard. We, too, expressly leave this question open.

their determinations as to the first criterion are supported by the evidence and that their determinations as to the other two criteria are supported by the presumption of administrative correctness. We cannot accept the latter premise. As we recently pointed out, where the appraiser may have arrived at his result on the basis of any one of a number of different subsidiary findings and there is no indication in the record which of the subsidiary findings he in fact made, there is no presumption that he made *all* of them. *Mannesmann-Meer, Inc.* v. *United States*, No. 5359, decided October 29, 1970.

However, the presumption of correctness attaching to the appraiser's *result* is independent of the presumption of correctness attaching to the appraiser's subsidiary findings, and Zerkowitz therefore had the burden of proving that the American selling price of the "Rover" tennis shoes used as the basis for appraisement did not conform to any of the three criteria. As we have remarked, both courts below found that the "Rover" tennis shoes satisfied all three criteria, and we cannot upset their decision on this point if there was "any substantial evidence" that the selling price of the domestic shoes conformed to any one of the three criteria. When limited to such a narrow scope of review, "there is no occasion for a detailed review of all the evidence." *United States* v. *Collins & Gissel*, 29 CCPA 96, 98, 123 F. 2d 147, 148, C.A.D. 176 (1941). Suffice it to say that, while we might find this a close case of the test were whether the determination was "clearly contrary to the weight of the evidence," we find that there was "substantial evidence" to support the finding below that the U.S. Keds "Rover" tennis shoes were freely offered for sale for domestic consumption to all purchasers in New York City, which the appraiser determined to be the principal market,[*] in the ordinary course of trade and in the usual wholesale quantities at the prices the appraiser used to appraise the imported tennis shoes.

III. *If Not The "Rover," What?*

Since we have concluded that at least some of the "Rover" tennis shoes used as the basis for appraising the imported shoes were not "similar" to the imported shoes within the meaning of 19 USC 1336,

[*] We agree with the judge dissenting below that the appraiser's determination that New York City was the principal market for U. S. Keds "Rover" tennis shoes was shown to have been based on woefully outdated evidence. However, we disagree with him that "a presumption as to location of principal market cannot be indulged here since the appraising officers and the manufacturer of the counterpart shoe have given evidence of being without the knowledge and information on which such a presumption could rest." Regardless of the correctness of the appraiser's determination, the orderly administration of customs law requires that it must stand unless and until the importer establishes an alternative. In this case, Zerkowitz offered no evidence tending to prove either that New York City was not the principal market for the domestic tennis shoes or that some other city was. Hence, the appraiser's determination stands, weak as its foundations are.

we must decide on what basis those importations which it is determined on remand were incorrectly appraised *should* be appraised.

In the very first reported opinion in this case, the original trial judge, the late Judge Mollison, set aside the submission of this case and restored it to the calendar for the purpose of receiving further evidence directed to proving that *no* domestically manufactured tennis shoe other than the United States Rubber Company's U.S. Keds "Rover" tennis shoes were both "similar" to the imported footwear and marketed in accordance with 19 USC 1402(g). *A. Zerkowitz & Co.* v. *United States*, 48 Cust. Ct. 559, R.D. 10175 (1962). Zerkowitz and the Government have stipulated that the invoice price, f.o.b. port of lading, for the subject merchandise *was* its export value (19 USC 1402(d)) and that there was no higher foreign value (19 USC 1402(c)) for it; accordingly, the subject merchandise would be appraised at its export value if it were to be found that there was *no* domestically manufactured tennis shoe which was "similar" to the imported shoe, the American selling price of which was capable of being determined in the manner specified by 19 USC 1402(g).

The Government has argued that, even if there was no substantial evidence to support the appraiser's determinations concerning "Rover" tennis shoes,

> * * * the appraised value, nevertheless, would not be affected. It is presumed that the Appraiser found a price which an American manufacturer would have received or was willing to receive for like or similar merchandise * * *

citing *Hudson Shipping Co.* v. *United States*, 43 CCPA, 19, 30, C.A.D. 604 (1955). We cannot agree. Neither that case nor the logic giving rise to the presumption supports the rule for which the Government contends. The presumption is, as we have often remarked, two-fold. It is presumed, first, that the appraiser's factual determinations were correct, and, second, that the appraisement itself is correct. However, one cannot derive from this that the appraiser is to be presumed to have done correctly what he clearly did not do at all.

The *Hudson* case merely sets forth the manner in which appraisers can arrive at prices which domestic manufacturers "would have received" or were "willing to receive," stating that, "from the evidence introduced, it seems clear that the appraiser *would* have had no difficulty in determining the price which the American producers * * *

'would have received' or were 'willing to receive'." (Emphasis ours.) However, "Since appellant [the importer] * * * offered no evidence tending to negative the possibility of a correct American selling price appraisal under the second part of section 402(g) [19 USC 1402(g)], it follows that he has not overcome the presumption of correctness attaching to the appraiser's valuation, and has not made out a *prima facie* case." (Emphasis ours.)

The *Hudson* case, therefore, is authority for the proposition that where the appealed appraisement could have been based on any one of a number of different subsidiary facts, the appellant has the burden of establishing the nonexistence of all of those facts. This is so because, as the *Hudson* case points out, the presumption of correctness attaches, not only to the determination of the specific subsidiary fact or facts actually found by the appraiser, but also *to the appraiser's valuation*, and the party contesting the appraisement must offer evidence making out at least a prima facie case establishing the nonexistence of all the other possible subsidiary facts the existence of which would support the appraiser's determination. Of course, if the Government submits evidence tending to prove the existence of subsidiary facts supporting the appraiser's determination other than the subsidiary fact or facts actually found by the appraiser, the party contesting the appraisement has, not only the burden of *producing evidence* as to the nonexistence of these facts, but the burden of *persuading* the trial court of their nonexistence as well. See generally, McCormick, *Evidence*, §§ 306 & 307, pp. 635–639.

In this case, Zerkowitz did offer evidence tending to establish both that there were no "similar" domestic shoes other than the pre-1959 "Rover" and that, if any such shoes existed, no American selling price could be determined for them in the manner specified by 19 USC 1402(g). However, both lower courts found that there *were* other domestically manufactured tennis shoes which were "similar" to the imported tennis shoes the American selling price of which could be determined in the manner specified by 19 USC 1402(g). We cannot say that their determination was not supported by substantial evidence.

Accordingly, this case must be remanded for further proceedings to insure that the imported shoes are appraised on the basis of the American selling price of legally "similar" domestic shoes.

APPENDIX C

Decision of the Customs Court

(A. R. D. 250)

A. ZERKOWITZ & Co., INC. *v.* UNITED STATES

Application for Review of Reappraisement Decision 11095 Reappraisement R60/20082-7201 and three others

Entered at New York, N. Y.; Baltimore, Md.; San Francisco, Calif.

Entry No. 961416, etc.

Second Division, Appellate Term

[Affirmed.]

(Decided March 5, 1969)

FORD, Judge: This is an application for review of a decision and judgment of the trial court holding certain imported canvas-topped, rubber-soled footwear to be subject to appraisement on the basis of American selling price as defined in section 402a(g), Tariff Act of 1930, as

amended by the Customs Simplification Act of 1956, 91 Treas. Dec. 295, T. D. 54165. *A. Zerkowitz & Co., Inc.* v. *United States*, 55 Cust. Ct. 643, Reap. Dec. 11095.

The footwear the subject of the reappraisement appeals at bar which were consolidated for trial is of Japanese manufacture and origin, is composed of a cotton canvas upper and a rubber or rubber substitute sole, and is generally described as a circular vamp tennis-type oxford shoe. Footwear of this kind appears on the Final List promulgated by the Secretary of the Treasury in T. D. 54521, by reason of which, valuation of same for customs purposes is governed by section 402a, Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

Appraisement of the involved footwear under section 402(g) was predicated upon Presidential Proclamation No. 2027, in T. D. 46158, 63 Treas. Dec. 232, and the so-called flexible tariff provisions of section 336, Tariff Act of 1930. The appraisers adopted as the domestic counterpart shoe the "Rover" tennis-type oxford shoe manufactured in the United States by the United States Rubber Company and marketed under its U. S. Keds label, returning the following prices, less 2 percent cash discount, packed, for the period of the involved exportations, as representing the selling prices for the domestic counterpart article:

Price Year	Children's sizes	Juniors' sizes	Women's sizes
	5-12	12½-3	3½-10
1958-59	$2.10	$2.25	$2.50
1959-60	2.20	2.35	2.65
		2.40	

Appellant, the plaintiff-importer below, contended before the trial court and contends here that the imported foot-

wear is not like or similar to the domestic counterpart footwear selected for appraisement purposes, nor like or similar to other domestically produced canvas-rubber tennis-type oxford shoes, and that the counterpart shoe and other domestically produced shoes as aforesaid were not offered for sale or sold under conditions conforming to the statutory American selling price formula. In support of these contentions appellant adduced below the testimony of an officer and an employee of the importing firm here involved, two shoe wholesalers, a shoe retailer, a shoe buyer, a textile engineer, a college professor of marketing, two customs examiners and two customs appraisers, an officer and an employee of a subsidiary company of the United States Rubber Company, and an officer and employees of other domestic manufacturers of canvas-rubber footwear. Appellant placed in evidence numerous documents, among which are price lists and sales policies of U. S. Rubber Company and other domestic footwear manufacturers, a shoe patent, and laboratory test reports on footwear samples, as well as samples of the imported footwear and of domestic footwear manufactured by U. S. Rubber Company. In addition, appellant argued both before the trial court and here that appraisement of the involved merchandise on the basis of the American selling price formula is illegal, contending that the Protocol of Terms of Accession by Japan to the General Agreement on Tariffs and Trade, T. D. 53865, concluded between the United States and Japan pursuant to the Trade Agreements Act abrogated the flexible tariff statute and customs treatment of merchandise such as that at bar, returning customs treatment of such imported merchandise to its earlier treatment which in this case is conceded to be paragraph 1530(e), Tariff Act of 1930.

In support of the appraised values the Government adduced the testimony of the New York examiner of merchandise, and an officer and employees of the United States Rubber Company with a view toward establishing that the imported footwear was similar to the "Rover" oxford and that the "Rover" selling prices conformed to the American selling price formula. The Government, the appellee here, also contends throughout that the statutory American selling price basis of valuation is the only proper basis for appraising the involved merchandise. The parties have also stipulated that should the courts determine that American selling price is not the proper basis for valuation of the footwear at bar, that the invoice prices represent the correct export value for this merchandise, and that there is no higher foreign value therefor.

On the instant record the court below sustained the appraised values. First, the trial court rejected appellant's contention that the Trade Agreements Act of 1934 rendered inoperative the Presidential Proclamation No. 2027 when the Japanese Trade Agreement, *supra,* became effective in 1955, stating (55 Cust. Ct. at page 647):

> The broad purpose of the Trade Agreements Act of 1934 and its subsequent extensions (section 350(a) of the Tariff Act of 1930, as amended, 19 USC § 1351, as amended) was to expand the foreign trade of the United States by permitting the President to enter into reciprocal trade agreements with other nations by which existing duties or import restrictions would be modified within the limits provided. *Star-Kist Foods, Inc.* v. *United States (Bruno Scheidt, Inc., Party in Interest),* 47 CCPA 52 C. A. D. 728. Section 350(a) 2(a) was included in order that trade agreement concessions might not be nullified through the procedure

provided in section 336. Existing proclamations would not have this effect since they would be known to the parties when trade agreements were negotiated and conditions under them would be the basis of negotiation. Where a rate of duty has been increased by a Presidential proclamation under section 336, it may be reduced by a trade agreement entered into under the authority of section 350(a), but if the trade agreement is terminated, the rate of duty reverts to that provided for in the Presidential proclamation. *Barclay & Company, Inc.* v. *United States,* 47 CCPA 133, C. A. D. 745. The section 336 proclamation is not abrogated by the trade agreement or the proclamation proclaiming it but is merely suspended.

With respect to appellant's contention that the basis of appraisement here is illegal, raised in the late trial stages, we are in agreement with the trial court's finding of legality. Apart from what the trial court had to say on the matter as hereinbefore noted, we are of the opinion that 19 U. S. C. A., section 1352(a), the pertinent portion of which reads:

> The provisions of section 1336 of this title shall not apply to any article with respect to the importation of which into the United States a foreign-trade agreement has been concluded pursuant to this part, or to any provision of any such agreement. * * *

addresses itself solely to the use of section 1336 as a *procedural device,* and that what is intended by the language above noted is the barring of the use of that statutory procedure in derogation of the operation of a trade agreement concluded pursuant to section 1351. To admit of the broad construction of section 1352 for which appellant contends

would, in our view, require the addition of language to that above noted so as to make the statute applicable not only to the provisions of section 1336 of this title, but to make it also applicable to the customs treatment of articles pursuant thereto.

In any case, a construction of section 1352 as embracing prior proceedings and determinations made under section 1336 would seem to lead to redundancy. The obvious, if not avowed purpose of the Trade Agreements Act of 1934 as expressed in section 1351 is to empower the President to undo or nullify (at least temporarily) the tariff restrictions brought about by and resulting from the provisions of section 1336 among other things. Indeed, the extensive use of the Trade Agreements Act to this end to which both parties advert in the briefs attest to such purpose. Hence, Congress, having enacted legislation in section 1351 which enabled the President to effectively deal with restrictive tariff treatment of articles the subject of section 1336 (during the life of a trade agreement concession covering such articles), would, under appellant's interpretation of section 1352, be deemed to have come back in the succeeding statute (section 1352) to deal with the same subject matter again. Or what is equally as bad as surplusage of language, is that under appellant's construction of section 1352 the efficacy of section 1351 trade agreement proceedings to affect existing section 1336 is non-existent or is left in doubt apart from the provisions of section 1352. An interpretation of section 1352 which leads to the inharmonious results which appellant's view invites is to be avoided over one that implements the legislative intent to broaden rather than restrict trade with foreign countries.

As we view the situation, section 1336 pertaining to canvas-rubber footwear of the type here involved effected only a change in the basis of valuation of such footwear,

and not a change in the rate of duty assessable against such imported footwear. The subsequent section 1351 trade agreement pertaining to such merchandise effected only a modification of the duty rate on such footwear, and not a change in the basis of valuation. Hence, insofar as the impact of section 1351 upon section 1336 is concerned, it would seem following the reasoning of our appeals court in *Barclay & Company, Inc. v. United States*, 47 CCPA 133, C. A. D. 745, that section 1336 was at best only suspended, and this, *pro tanto* to the extent of the duty rate, leaving intact the basis of valuation of the merchandise affected by section 1336. In view of the bargaining limitations placed upon the actions of the trade negotiators perforce of section 1351, it is difficult to see how they could have effected a change in the basis of valuation of the subject merchandise within the framework of such limitations by their actions even if they were of a mind to do so. We are, therefore, under the circumstances attendant here, inclined to agree with appellee's argument that the trade agreement rate of duty constitutes an American selling price rate of duty within the meaning of section 402(a)(4), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, since the trade agreement did nothing to abrogate the existing basis of valuation.

Moreover, we do not find any language in the Trade Agreements Act of 1934 which operates to regulate, prescribe, or circumscribe Presidential courses of action in negotiating trade concessions in bilateral or multilateral agreements within the expressed statutory limits, nor any prohibition therein against recognition by contracting parties to such trade agreements of the American selling price basis of valuation or any other basis of valuation as a circumstance in the negotiation of concessions.

In view of our determination, *supra,* and since the imported shoes have "uppers" composed of the specified material and appellant does not challenge the validity of the Presidential proclamation, except as heretofore determined, appraisement must be made under the provisions of section 402(g), *supra,* if all the elements are present. This, of course, is based upon the proviso that the domestic competitive article selected by the appraiser is like or similar to the imported article as required by section 336, *supra.* Such determination was made by the appraiser and his action under the law carries with it a presumption of correctness.

The question of whether an imported article is like or similar to a domestic article was before the court in *Japan Import Co., Inc.* v. *United States,* 2 Cust. Ct. 926, Reap. Dec. 4568, affirming 1 Cust. Ct. 607, Reap. Dec. 4389. The court therein set forth the following factors to be considered in making their determination:

1. Similarity of material
2. Commercial interchangeability
3. Adaptability to the same use
4. Competitive character

The record establishes and an ocular inspection of the imported article and the domestic shoe confirm similarity of material. Whether the cushioned innersole and shockproof arch cushion are recognized differences, we nevertheless feel they are legally "similar" within the purview of section 336, *supra.* The differences are not unlike those in *Mutual Supply Co.* v. *United States,* 14 Cust. Ct. 291, Reap. Dec. 6086, wherein the court stated: "They are the same in shape, in design, and practically the same in construction. Appellant points out that the presence of a

strip of metal in the soles of the domestic shoe which tends to make it more rigid is an important point of dissimilarity." This phase was also discussed at length in the case of *Albert F. Maurer Co.* v. *United States*, 51 CCPA 114, C. A. D. 845. Of particular significance are the following pertinent observations made by the court:

> In summary, it is quite clear that the imported and the American rubbers have many points of similarity and many points of dissimilarity. They both serve the same purpose, to keep the feet dry. They are made of substantially the same material. Both are flexible enough to fold up and stuff in a case or pocket. Though there is a measurable difference in hardness according to the evidence, it would not be apparent to the average customer.
>
> The true question here, as we see it, is whether, in order to carry out the intent of Congress in enacting the flexible tariff law, section 336, we should affirm the holding that the Moderna and Tingley rubbers are legally "similar" notwithstanding their differences.
>
> We must not lose sight of the basic fact that the purpose of the Presidential Proclamation of 1933, and the statutory purpose which it implemented, was protection of American manufacturers and labor from foreign price competition with respect to the goods named in the proclamation. Among those goods was "footwear, wholly * * * of india rubber * * *." The proclamation increased the tariff on such goods to 25% ad valorem based upon the *American selling price of* "like or similar articles" made in the United States. Surely the underlying principle is to protect American manufacturers from foreign competition where foreign

goods sufficiently "similar" to them to compete with them are imported. *H. H. MacDonaugh & Co.* v. *United States,* 38 CCPA 36, C. A. D. 436. If the collector can find no American article sufficiently similar to the one imported to create market competition with it, obviously no one is going to be disadvantaged, there is no point in applying the proclamation, and as a matter of law it would not apply. On the other hand, where imports are sufficiently similar to American goods to compete directly with them, and the goods are within a category named in the proclamation, it would seem to be within the intent of Congress that they receive the protection the proclamation was intended to afford. The whole scheme was to protect specified American manufactures whenever and if foreign competing merchandise came in by charging the latter with an ad valorem duty based on American selling price of the American-made protected articles, in the words of the statute itself, in order to "equalize the differences in the costs of production of the domestic article and the like or similar foreign article * * *."

In taking into consideration the basic purpose behind section 336, we do not give much weight to prior adjudications involving the meaning of the word "similar" as it is used in other provisions of the Tariff Act. The problem is one of economics, not semantics. It therefore serves no useful purpose and only creates confusion to discuss all the shades of meaning of the word "similar" or how it has been construed in other cases involving other sections of the statutes.

The principle that goods may be legally "similar" for the purposes of section 336 notwithstanding the existence of numerous differences has been established

in prior decisions. *Japan Import Co.* v. *United States*, 24 CCPA 167, T. D. 48642.

We are of the opinion that the innersole and arch fall within the same category of differences.

Commercial interchangeability and adaptability to the same use may be considered together since it is obvious that in an article such as this commercial interchangeability would in fact be based upon use. Notwithstanding the difference in the soles of the two types of tennis shoes and the testimony of their use on clay tennis courts, we are of the opinion that the imported article and the "Rover" are commercially interchangeable and adaptable to the same use. The additional reasoning as set forth in the opinion below relative to price, quality, advertisement, and retail sales outlets are adopted in our finding of compliance with the determining factors as set forth, *supra*, including competitiveness of character which we additionally would add the testimony of the witnesses of the domestic producers of such shoes, who all felt such shoes are competitive. Hence, the provisions of section 336, *supra*, are met.

In view of the foregoing, appraisement must be made under the provisions of paragraph 402(g), *supra*, if such sales meet the requirements of said section, *supra*.

Section 402(g) provides as follows:

> The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale for domestic consumption to all purchasers in the principal market of the United States, in the ordinary course of trade and in

> the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold for domestic consumption in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

In the *MacDonaugh* case, *supra*, involving the same proclamation and type of merchandise, the court made the following statement:

> There are really two definitions. The first embraces the phrase "freely offered for sale," which long has been used in tariff acts in defining (1) foreign value, (2) export value, and (3) United States value. (See paragraphs (c), (d), and (e) of section 402 of the Tariff Act of 1930.) The phrase as so used has been construed often and need not be discussed here.
>
> The second definition is alternative. It is embraced in the clause reading, "or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article."
>
> So far as we have been able to ascertain, the last clause quoted appeared for the first time in section 402(f) of the Tariff Act of 1922. Obviously, it is a very broad provision, evidently inserted to supplement the first provision in a manner favorable to domestic industries.
>
> * * * * * * *

> Certainly all the pertinent testimony of Pennington and other witnesses is to the effect that the United States Rubber Company would have been "willing to receive" the list prices of the shoes (allowing discounts as is customary in business transactions) "sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article."

It is apparent that the alternative definition as set forth in section 402a(g) does not require that the domestic merchandise must be freely offered, etc., but only that there be a price which the manufacturer, producer or owner would have received or been willing to receive.

Since the method of appraisement under said section 402a(g) is alternative in the event the primary method cannot be established or been shown not to exist, it is nevertheless incumbent upon the party challenging a presumptively correct appraisement to also negate the alternative existence of American selling price. *Hudson Shipping Co., Inc.* v. *United States*, 43 CCPA 19, C. A. D. 604.

We are of the opinion that the merchandise is freely offered for sale to all purchasers at wholesale in the ordinary course of trade. The record herein establishes that price lists are circulated in the trade and merchandise is in fact sold to retailers and two wholesalers while not being sold to other wholesalers or discount houses. This situation is not unlike the facts that existed in the *MacDonaugh* case, *supra*, where the court said:

> From Pennington's testimony, it is apparent, we think, that the company which he represented was not actually *trying to sell*, in the region of which San Francisco was the principal market, shoes of the type here involved to any concerns other than retailers. In

all the Pacific Coast region the company had just one jobber customer. It was located at Sacramento, California. There were other jobbers in the region. There is no evidence showing that salesmen called upon such jobbers, or that their patronage was sought by mail, or in any other manner, but, on the other hand, there is no evidence that any jobbers ever sought to become customers, or that the United States Rubber Company ever received an offer from any concern to purchase which it refused.

Certainly all the pertinent testimony of Pennington and other witnesses is to the effect that the United States Rubber Company would have been "willing to receive" the list prices of the shoes (allowing discounts as is customary in business transactions) "sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article." [Emphasis quoted.]

The record also establishes that sales to retailers in the ordinary course of trade were at list prices less 2 per centum except at certain times of the year when different seasonal discounts were allowed and special discounts were allowed the two wholesalers. While the record is meager on the question of usual wholesale quantity, we are of the opinion that this is sufficient evidence adduced to establish said quantity to be between 12 pairs and 480 pairs. The record indicates all such sales are at list price less 2 per centum which is basically, according to the record within the exception of seasonal discounts and wholesaler discount, the manner in which all sales are made. With respect to the principal market, the testimony of Mr. Anastasio, General Sales Manager, Consumer Goods, Footwear Division, United States Rubber Company, establishes

to our satisfaction that New York City is the principal market.

In any event since the alternative method of appraisement under American selling price does not necessitate compliance with the requirement in the primary portion of section 402a(g) and since if the party contesting the appraisement is able to eliminate the primary requirement, it still has the burden of negating the existence of American selling price. Under the alternative method, the importer has clearly failed to meet its burden of proof. The record herein clearly establishes, not only that the manufacturer selected, United States Rubber Company, but Bata Shoe, B. F. Goodrich, Bristol Manufacturing, and Tyer Rubber Company, all produced footwear which they considered comparable. Whether or not these firms met the primary requirements of section 402a(g), they did establish the prices they would be willing to receive which complies with the ultimate requirements of said section 402a(g).

The dissenting opinion brings to our attention that merchandise covered by appeal R61/6166 contains no notation of appraisement. A review of these entry papers does indicate that no notation of appraisement is contained therein with respect to tennis shoes. All other items covered by the invoice appear to carry the appropriate notation of appraisement and the reverse side of the "Summary of Entered Value," customs Form 6417, contains the signature of the acting deputy appraiser indicating appraisement. Since the entry was deemed appraised by the designated official, we must assume since no advance was made that the appraisal was as entered. This is, of course, based on the premise that a Government official is presumed to have acted in accordance with the law. *United States* v. *C. O. Mason, Inc., etc.*, 51 CCPA 107; C. A. D. 844. The record

having established the proper value to be the prices reflected in the price list for the "Rover," the value of said merchandise is as reflected therein.

It is to be noted, as pointed out in the dissenting opinion, that in a number of entries the appraised value differed from the price list of U. S. Rubber. Former footwear examiner, Alexander, indicated the appraisement was made "by all reasonable ways and means." This is not a unique situation and in fact is sanctioned by law.[1]

Upon the record here presented the court finds as facts:

1. That the merchandise involved herein consists of so-called tennis oxfords, having uppers wholly or in chief value of cotton and sole wholly or in chief value of rubber, exported from Japan during 1958, 1959, and 1960.

2. That the imported merchandise was of the class or kind described in Presidential Proclamation No. 2027, dated February 1, 1933, 63 Treas. Dec. 232, T. D. 46158.

3. That the imported merchandise was of the kind described in paragraph 1530(e), Tariff Act of 1930, as modified by the Protocol of Terms of Accession by Japan to the General Agreement on Tariffs and Trade, T. D. 53865.

4. That the imported merchandise was appraised on the basis of the American selling prices of a circular vamp oxford produced by the United States Rubber Company, called the "Rover," a style in the line sold under the registered brand name "U. S. Keds."

5. That the Rover and the imported merchandise had a similar appearance, were made of similar material, were of similar construction, had substantially the same uses and

---

[1] Section 500, Tariff Act of 1930.

To appraise the merchandise in the unit of quantity in which the merchandise is usually bought and sold by ascertaining or estimating the value thereof by all reasonable ways and means in his power, any statement of cost or cost of production in any invoice, affidavit, declaration, or other document to the contrary notwithstanding.

purposes, and would compete for purchase by many of the same persons. That the Rover was heavily advertised and the imported article was not; that the Rover was somewhat superior in durability and sold at a higher price; that the channels of distribution were substantially but not completely different.

6. That, in the ordinary course of trade, the Rover was freely offered and sold only at list prices, less 2 per centum, the price not varying according to the quantity purchased, except for a surcharge of 50 cents for a purchase under 12 in quantity. That most sales were to retailers. That no additional discount was offered to wholesalers or jobbers, except for two in a restricted category. The factory makeup discounts were allowed for orders accepted from August 1 through December 31, for shipment December 1 through April 25, and quantity discounts for at-once orders of 480 pairs or more in case lots of 1 item.

7. The principal market of said merchandise is New York City.

8. That the manufacturer received or was willing to receive for the Rover, when sold in the ordinary course of trade and in the usual wholesale quantities at the time of exportation of the imported article, the list prices, less 2 percentum, which prices were equal to the appraised values.

9. That the merchandise covered by appeal R61/6166 was appraised as entered no notation by the appraising officer appearing on the entry.

The court therefore concludes as matters of law:

1. That Presidential Proclamation No. 2027 has not been abrogated or suspended by the modification of paragraph 1530(e), Tariff Act of 1930, by the Protocol of Terms of Accession by Japan to the General Agreement on Tariffs and Trade, T. D. 53865.

2. That the proper basis for determining the values of the imported merchandise is the American selling price, as defined in section 402a(g), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, 70 Stat. 943.

3. That the U. S. Keds "Rover" is similar to the imported merchandise.

4. That the American selling prices of the U. S. Keds "Rover" were those found by the appraiser.

5. That the dutiable values of the imported merchandise are the appraised values.

Judgment will be entered accordingly.

MORGAN FORD,
J.

Concurring:
LANDIS,
J.

DISSENTING IN PART

RICHARDSON, Judge: While I fully subscribe to the views expressed by the majority in arriving at the conclusion that it was not illegal for the appraisers to undertake the appraisement of the merchandise at bar under the American selling price formula, I cannot subscribe to the majority's view that the instant record supports the appraisements returned herein under that formula and upheld by the court below, and accordingly, I am contrained to dissent from that phase of the majority's disposition of the instant application for review.

With respect to the matter of "similarity" between imported footwear and comparable domestic counterpart footwear—the foremost point to be considered under the American selling price valuation formula—it should be borne in

mind that Congress may prohibit the importation of specified merchandise altogether, it may permit its importation only on a quota basis, or it may impose guidelines for the importation of competitive merchandise which it feels are adequate to protect American industry and labor. In this case Congress laid down certain guidelines—the American selling price of similar* domestic counterparts of the imported shoes, if there be any. The appellant, on the record made in this case, has shown that the imported shoes are not "sufficiently similar" in construction to the domestic counterpart shoes placed in evidence to create competition with them. "Sufficiently similar" means that the imported shoes must be commercially acceptable substitutes for the counterpart shoes. There is substantial evidence in this case that they are not.

The court below said very little in its analysis of the differences and similarities between the "Rover" shoe and the imported shoe relative to the cushioned insole and shockproof arch cushion which United States Rubber Company added to the "Rover" line and which is mentioned in the manufacturer's price list effective August 1, 1959. This cushioned insole and shockproof arch cushion, which has the feel of foam rubber under a fabric covering, is shown in exhibit 1-F, but no such features are contained in the "Rover" designated as exhibit 6. Appellee's counsel conceded at the trial that the "Rover" of 1958 (exhibit 6) did not possess such features, while the "Rover" of 1959 and 1960 (exhibit 1-F) did possess these features (R. 182-185). In the case of the imported shoe, a type of foam rubber fabric-covered insole with built in arch support is contained in exhibit 3, but no such cushioned insole is contained in exhibit 9, although the insole of exhibit 9 does have the built in arch support.

* No contention is made that the imported footwear is "like" the domestic footwear.

It thus appears that both the domestic "Rover" shoe and the imported shoe were made with and without cushioned insoles, and in the case of the "Rover," with and without shockproof cushioned arch support. There is, however, one important difference between the "Rover" shoe and the imported shoe with respect to the feature of the cushioned insole. In the case of the imported shoe, both types of shoes (that is, shoes with and without cushioned insoles) were brought in *concurrently* by the appellant in 1959. However, with respect to the "Rover" shoe, the cushioned insole shoe came into existence in replacement of the non-cushioned insole shoe, with the changeover occurring *in 1959*, the year in which the merchandise at bar was exported from Japan.

In the instant record it appears that appraisement of the imported shoes *without* cushioned insoles was undertaken by the measure of a "Rover" shoe *with* a cushioned insole and shockproof arch cushion, and *vice versa*, with varying results between the involved appraisers. Under entry 961416 of appeal R60/20082 covering cushioned insole footwear identified on the invoice as Art. No. 74025 and exported on March 20, 1959, it appears that the appraiser at New York used a "Rover" price (exhibit 4, page 6) for a non-cushioned insole "Rover" shoe in returning *values* for children's, juniors', and women's sizes (listed at $2.05, $2.20, and $2.45, respectively) at $2.10, $2.25, and $2.50, respectively. In apparent explanation for this method of appraisement under the American selling price formula the examiner, Abraham Alexander, testified at the trial (R. 210), " . . . we had to go by all reasonable ways and means at the time or it would have taken a thousand men to do it." But under entry 836749 of appeal R61/6166, also a New York entry, it appears that the appraisement in a multiple item return

did not reflect any price or *value* at all* for the non-cushioned insole canvas-rubber shoes exported from Japan on September 30, 1959—the then appropriate "Rover" list price being only for cushioned insole and shockproof arch cushioned shoes (exhibit 7, page 5).

Under entry 38432 of appeal R59/18530 covering non-cushioned insole footwear identified on the invoice as Art. No. K-12782 and exported on May 31, 1959, it appears that the appraiser at San Francisco used a "Rover" price (exhibit 7, page 5) for a cushioned insole "Rover" shoe in returning a *value* for juniors' sizes (listed at $2.40) at $2.35 per pair, less 2%, packed. It is noted that this merchandise was exported May 31, 1959, and the appraiser at San Francisco made his appraisement September 15, 1959 on the basis of a "Rover" price list effective August 1, 1959, which was the first time the United States Rubber Company added cushioned insole and shockproof arch cushion shoes to its line. 19 U. S. C. A., section 1402(g) requires the appraiser to use a domestic selling price in effect on the date of exportation. His having used a price not effective until sixty days after the date of exportation is not a compliance with the statute.

Under entry 5351 of appeal R60/16359 covering both cushioned insole and non-cushioned insole footwear, identified on the invoice as Art. No. 74025 and Art. K-12782, respectively, and exported on August 15, 1959, it appears that the appraiser at Baltimore used a "Rover" price (ex-

* Section 14.2(t) of the Customs Manual as amended September, 1958, by amendment number 585 required a check mark in the "Appraised" column on customs Form 6417 in order to effect an appraisement of merchandise "as entered" and as the majority opinion indicates there is no check mark on the entry paper. But an appraisement as entered operates in direct contradiction of the majority opinion's conclusion as to American selling price appraisements in this case. An appraisement "as entered" with respect to the canvas-rubber shoes of this particular entry would leave in effect the Japanese export value prices which are set forth in the invoice covered thereby.

hibit 7, page 5) for a cushioned insole "Rover" shoe in returning prices for both items in children's, juniors' and women's sizes (listed at $2.20, $2.40, and $2.65, respectively) at list prices, less 2%, packed.

Thus, with the exception of canvas-rubber footwear described on the invoice under the aforementioned Baltimore entry, the merchandise at bar was either not appraised, or if appraisement thereof was attempted under the American selling price formula, was not appraised at prices reflecting actual American selling prices, but was assigned what amounts to so-called "all reasonable ways and means" values. And it would appear that this phenomenon is attributable to the variation in the insole and arch support components of the shoes undergoing comparison for appraisement purposes. There is no question about the authenticity or accuracy of the actual prices listed by U. S. Rubber Company for the counterpart domestic shoes here involved, governing the periods of the subject exportations (R. 211, 257). The footwear identified under Art. No. 74025 on the invoice of the said Baltimore entry was appraised at these actual list prices, and on an imported article matching the domestic counterpart article component-wise in a degree in which the other imported articles here involved did not.

I also note from the involved invoices that the difference in composition of the insole is reflected in the invoice pricing of the imported shoes in the country of exportation, as well as in the appraisement practices heretofore commented upon with respect to the entries at bar—the practice indicating the extent to which the difference in insole influenced the thinking of the exporters as well as the appraisers with respect to prices and values. Of course, appraisement here on the basis of American selling prices can-

not properly proceed upon the judgments of appraising officers as to value in substitution of actual domestic prices. For any extension of the so-called "all reasonable ways and means" concept here in the manner indicated in the majority opinion, that is, by substituting constructive values in the place of actual prices, would be in plain derogation of the statutory mandate to the appraiser to value the merchandise in terms of "prices."

Also, mention should here be made of the fact that witnesses whose testimony is relied upon by both parties herein appear to have recognized the significance of variation in insole and arch support features in the shoes in question. Mr. Albert Zerkowitz, president of plaintiff corporation, testified on cross examination by Government counsel (R. 17):

> THE WITNESS: Exhibit 9 is a cheap shoe without any cushion insole, without any arch support, not suitable for people who are accustomed to wear shoes with cushion insole and with arch support. Somebody wears one type of shoe or another type of shoe.

And Joseph Anastasio, a U. S. Rubber Company footwear division general sales manager, testified (R. 724):

> Q. In your opinion, is a shoe with shockproofed arch, and cushioned inner soles, superior to a shoe without these features?— A. In my opinion, yes.

Mr. Anastasio had previously testified that such features make a shoe more comfortable (R. 723).

I am satisfied that the instant record, reinforced by an inspection of the samples at bar, compels the conclusion that the cushioned insole and shockproof arch cushion add a measure of support and comfort to the wearer of a shoe so equipped (The Rover) which are not afforded to the

wearer of a shoe without these features (the imported shoe). And it can scarcely be debated that support and comfort are the prime requisites of footwear. Consequently, I am of the opinion that the presence or absence, as the case may be, of the cushioned insole and shockproof arch cushion in the footwear under comparison here makes a decided difference in the comparability status of the compared footwear even if the other factors discussed by the court below do not.

I am not unmindful of statements made by our appeals court in *Albert F. Maurer Co.* v. *United States,* 51 CCPA 114, C. A. D. 845, to which attention is called in the majority opinion herein on the matter of "similarity" in American selling price valuations. The record in this case is not at odds with what I find to be salutary *policy considerations* mentioned in the *Maurer* case. However, an awareness of a policy to protect domestic industry and labor where imported goods are competitive with similar domestic merchandise does not require a finding of similarity within the meaning of the statute merely because the foreign and domestic items fall within the same broad use classification. For example, a Ford Falcon and a General Motors Corp. Cadillac are both automobiles, but they are far from being similar in construction.

Likewise, the imported articles and the domestic counterpart articles here involved are both shoes of the canvas-upper and rubber-soled variety. But the noted differences in component parts in the domestic shoes, i.e., shockproof arch and cushioned insole, providing a firmer and more comfortable fit, make them substantially different from the imported shoes—a difference which is accentuated by a wide price disparity of approximately 200% (i.e., $2.05 for the domestic shoe as against 60 cents for the imported shoe).

Also, it is to be noted that the *Maurer* case points out that the difference with which the court in that case was dealing as between the imported article and the domestic counterpart article was one which would not be apparent to the average customer. However, in the case at bar no such subtle or unnoticeable difference marks the cleavage between the opposing articles. In fact, the aforementioned differences in construction, comfort and price between the articles at bar are so sufficiently pronounced as to make the articles non-competitive.

Therefore, on the matter of "similarity" alone, the evidence of record militates against such a finding in my judgment. And in any case, with the notable exception of the footwear covered by appeal R60/16359, the failure of the appraisers herein to either appraise the imported footwear or to return actual American selling prices therefor voided appraisement of such footwear under the American selling price formula, in which cases judgment should be rendered here in accordance with the stipulated values in lieu of remand to a single judge for value determinations.

Even though appraisement of the merchandise covered under appeal R60/16359 is not "void" because made in terms of "actual" American selling prices, and even if the footwear described under Art. No. 74025 on the invoice in said appeal can be said to be "similar" to the "Rover" shoe because such footwear matches the domestic counterpart shoe component by component in a degree that the other shoes under said entry do not, the other criteria under the American selling price formula must be considered in connection with appraisement of the merchandise of said appeal.

With respect to the merchandise of appeal R60/16359, I cannot agree with the majority's conclusion that the

"Rover" shoe was *freely offered* for sale to all purchasers, *including wholesalers*, at list prices, less 2% cash discount. I think a fair appraisal of the evidence bearing on the point leads to the opposite conclusion, namely, that the domestic manufacturer of the "Rover" shoe refused to sell that and other of its label shoes to wholesalers generally. In answer to a question posed by appellant's counsel as to whether U. S. Rubber Company would sell to wholesalers at a 2% discount, the company's footwear division general sales manager, Mr. Anastasio, testified that the company's present policy was not to sell to wholesalers at all (R. 259-261). And it was brought out in the court's questioning of that witness and of Harold N. Barrett, vice president and general manager of the footwear and general products division of said company, that the company's *present policy* period dated back to around 1940, so as to cover the period at issue here (R. 275-298).

And it appears that wholesalers were a class of persons who handled such merchandise. Herman Cohen and Hyman Zamkoff, shoe wholesalers, testified that although they handled domestically made canvas-rubber footwear made by companies such as Bata Shoe Company and Converse Rubber Company, they were not able to or did not handle the canvas-rubber footwear of U. S. Rubber Comapny. Mr. Zamkoff gave the reasons as being because U. S. Rubber Company did not sell to jobbers (R. 147-148). Such evidence of exclusionary practices was not before the court in *H. H. MacDonaugh & Co. et al.* v. *United States*, 38 CCPA 36, C. A. D. 436, on which the majority rely to reach the conclusion they do on the subject of free offerings.

On the matter of "usual wholesale quantity" for the "Rover" shoe, the record shows, disregarding the seasonal and special discounts, that there were at the pertinent times

here involved three year round *wholesale quantities,* namely, 1 or more pairs up to 12 pairs, 12 or more pairs up to 480 pairs, and 480 or more pairs, that offering prices varied according to quantities purchased within the aforementioned categories, that the price in the first category was list price, less 2% cash, plus 50¢ service charge, the price in the second category was list price, less 2% cash, and that the price in the third category was list price, less 8%, less 2% cash.

The majority opinion states that the record is "meager" but "sufficient" on the subject of unusual wholesale quantity. I think this assessment is generous. There is no evidence of a single transaction involving offerings or sales made of the "Rover" shoe by U. S. Rubber Company at any time, although appellant's counsel pressed continuously for answers on this point from the appraising officers and key personnel connected with U. S. Rubber Company who testified in this case. An "opinion" was ventured by Mr. Barrett to the effect that about 60 percent of his company's sales were made in quantities below 480 pairs. But there is nothing in this witness' testimony to indicate that he was talking about anything other than total company products. So that the result is, while we have evidence of three distinct wholesale quantities, we have no evidence of the usual wholesale quantity which characterized U. S. Rubber Company's offerings and sales of *the "Rover" shoe* at the pertinent times.

By the same token the dearth of evidence of offerings or sales of the "Rover" footwear precludes any finding as to location of the principal market in the United States for the sale of such footwear, notwithstanding the New York appraiser's belief that the location of the principal market for such footwear in New York is a matter of common

knowledge. The record shows that the source of said appraiser's belief as to location of principal market stems from a 1933 customs bureau report which, as is manifest in the testimony of witnesses herein, has been supplemented or updated by little or no customs investigation of contemporary market conditions. There is a woeful lack of information in the record regarding specific offerings, sales, and volume of business in the "Rover" line of footwear in any domestic market, emanating from the appraising officers who testified and from the U. S. Rubber Company personnel who also testified and through whom said appraising officers must necessarily obtain such information insofar as that company's participation in the canvas-rubber footwear market is concerned. In fact, neither of the New York examiners who gave testimony seemed aware of the fact that the "Rover" shoe was not made in men's sizes as of the times in question. For both of these witnesses testified that the "Rover" shoe was made in men's sizes (R. 190, 211), when in fact the admittedly genuine price lists in evidence clearly show that a man's shoe was nonexistent in the "Rover" line.

And I certainly am not impressed with the testimony of Mr. Anastasio, U. S. Rubber Company's sales manager, on the matter of location of the principal market in New York City. On cross examination on this subject by plaintiff's counsel Mr. Anastasio testified that he didn't believe his company had ever had a specific figure on the number of sales or transactions of the Rover type shoe confirmed by the New York district office (R. 263-264), that he hadn't the "foggiest notion" of the volume of Rover type shoes sold in each of the company's district sales offices in 1958, and that he didn't know who in the company had the answer, although in an earlier deposition this witness had said that

he as much as anybody in the company would be in a position to supply these "statistics" (R. 272, 737-738).

The location of a principal market is a matter requiring common law proof in a court of law such as the Customs Court. And the court cannot take judicial notice of such a controversial item as is the question of location of a principal market. It is impossible for the court to make a finding here as to location of the principal market absent evidence of where the major portion of sales or offers of "Rover" footwear were made at relevant times in conformity to the statute. *Cf. Adolph Goldmark & Sons Corp.* v. *United States*, 22 CCPA 358, 362, T. D. 47378; *Innis, Speiden & Co. et al.* v. *United States*, 19 CCPA 1, 7, T. D. 44789. And a presumption as to location of principal market cannot be indulged here since the appraising officers and the manufacturer of the counterpart shoe have given evidence of being without the knowledge and information on which such a presumption could rest.

Therefore, on the state of the instant record, I am of the opinion that appraisement of the merchandise even under appeal R60/16359 is found wanting *vis-a-vis* the requirements of the primary definition of American selling price in 19 U. S. C. A., section 1402(g) (section 402a(g), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956).

Insofar as the secondary definition of American selling price under section 1402(g) is concerned, its criteria is simply not applicable to appraisement of the imported footwear covered by appeal R60/16359 (or any of the other appeals herein for that matter) on the basis of a comparison of the domestic counterpart shoe utilized in the appraisement, namely, the "Rover." In general, the alternate definitions of section 1402(g) are not intended to apply in

the same case, but are intended to govern different cases. *Cf. Aceto Chemical Co., Inc.* v. *United States,* 51 CCPA 121, 127, C. A. D. 846. And in particular, the second definition of American selling price under section 1402(g) is excluded from applicability here because the merchandise with which we are concerned consists of consumer goods that are sold under open market conditions and thus adaptable to consideration under the primary definition, whereas the second definition of section 1402(g) is addressed to producers' goods which are not sold under open market conditions, but are used by the producer to manufacture other marketable goods. See the incisive discussion on the point in *Hudson Shipping Co., Inc.* v. *United States,* 43 CCPA 19, 28-29, C. A. D. 604.

Both the *Hudson Shipping Co.* case and the *MacDonaugh* case deal with the second definition of section 1402(g), and are in apparent conflict on the point. The majority have relied on the *MacDonaugh* case. Be that as it may, it is only fair to point out that the *Hudson Shipping Co.* case was decided by our appeals court five years after it decided the *MacDonaugh* case. And in cases of apparent conflict in the construction of a statute, as would seem to be the case here, it is proper for a lower court to adopt the latest construction of that statute which is made by the appellate court. The majority opinion fails to observe such amenity here. And this omission takes on added significance in view of the statement made by our appeals court in *Hudson Shipping Co.* (pp. 28-29): ". . . This court has never had a case before it when it could *fully* consider the meaning of this part of section 402(g)." [Emphasis supplied.]

This brings me to the question of the extent to which the presumption of correctness attaching to the appraisement

extends with respect to the presumed existence of a domestic comparability standard with which imported merchandise is to be compared for the support of an American selling price valuation. Both the court below and the majority here have taken the position that appellant was required to and failed to negative the existence of comparable domestically produced footwear other than the counterpart footwear selected for appraisement purposes in the cases at bar. Appellant is not required to do so on the record in this case.

I fully agree with the majority that customs officers are presumed to have discharged their duties in accordance with law. And such consensus would not, on the facts of this case, require the court to go beyond the findings of these customs officers as to what merchandise is considered to be similar to the imported merchandise, and presume that there is other merchandise which is also similar to the imported merchandise.

A proper discharge of the appraisers' statutory duty here would require a consultation by the appraising officers of representative sampling and inspection of domestic articles believed to be like or similar to the imported article, as a prelude to the selection of the domestic article to govern valuation of the imported article, if any such like or similar domestic article be found. And the appraisers' selection of a particular domestic article for such purposes would seem to imply their rejection of other domestic articles, at least in the absence of a selection of alternative counterpart articles. This appears to be what the New York appraising officer did in the instant case. Mr. Alexander, the examiner who passed upon the involved New York importation, testified on direct examination by Government counsel (R. 239-240):

Q. In your duties as a customs examiner when a shoe such as Exhibit 9 is presented to you for value purposes will you explain to the court what you do to determine the dutiable value and to advice the appraiser as to your opinion as to the dutiable value?—A. Exhibit 9?

Q. Yes, the red shoe.

* * * * * * *

Q. What do you do?—A. I go to, or have gone—we have samples in our office of the shoes of many of the American manufacturers, of their basic shoes and other types of sneakers, oxfords, high-cut basketball shoes, calendered soles, molded soles. If we have knowledge from previous investigations of those samples we look and see which one it's similar to of one of the manufacturers.

* * * * * * *

A. . . . Excuse me, I do. I do the things that I have spoken of. Then we take that price.

Similar conduct on the part of an appraising officer pursuing an American selling price valuation at the port of New York was adverted to (and presumably deemed *apropos*) by our appeals court in upholding the appraiser's domestic counterpart article selection in *Japan Import Co.* v. *United States*, 24 CCPA 167, 174, T. D. 48642. In that case the appeals court stated (page 174):

> It appears from the testimony of the examiner, Gold, that in ascertaining American selling price the witness made investigation in the branch houses of Hood Rubber Co., Firestone Rubber Co., United States Rubber Co., and Cambridge Rubber Co., and that he found "certain similarities" existing between the im-

ported articles and the articles produced by those companies. Samples of the imported merchandise were introduced in evidence, and are known as Collective Exhibit 3. These are a pair of canvas-topped shoes, of the "lace-to-toe" type, with rubber soles, and reinforcement of various portions of the toe and canvas tops with rubber pieces.

* * * * * * *

Samples of the domestic goods with which comparisons were made were introduced in evidence and were before the court below and this court. * * *

Here, in view of the uncontroverted evidence of polarization on the matter of comparability at the administrative level around the "Rover" shoe of U. S. Rubber Company manufacture, to suggest that appellant must search elsewhere to negative the existence of comparability would be to question the thoroughness of the appraisers' research in sampling the canvas-rubber footwear industry. In view of the requirements of 19 U. S. C. A., section 2633, the reappraising court does not try the validity of the appraisement *de novo*. The appraisement is statutorily presumed to be correct, and a challenging party is not required to quarrel with phases of an appraisement with which he is in accord. And if I understand appellant's position correctly, it is not that the appraisers' comparability studies are faulty insofar as depth or breadth of coverage is concerned, but that their selection of a counterpart shoe is otherwise in error, and as such, constitutes no support for an American selling price appraisement under section 1402(g).

We are not here dealing with an American selling price founded upon a statute (i.e., coal tar products) mandating that basis of valuation for imported merchandise, as was

the court in the *Hudson Shipping Co.* case, where elimination of any similar competitive domestic product other than the appraiser's selection was deemed by our appeals court to be a prerequisite to the use of another basis of valuation. In the case at bar American selling price obtains, if at all, by virtue of Presidential proclamation only. But for such proclamation the merchandise at issue would be valued on the basis of one of the valuation bases set forth in the statutes other than American selling price.

In American selling price cases based on a proclamation this court has consistently taken the position that an importer challenging an American selling price appraisement is entitled to establish a value for imported merchandise on a valuation basis other than that used in the appraisement, upon a showing that the domestic counterpart article relied upon by the appraiser is improper. *Mutual Supply Co.* v. *United States,* 5 Cust. Ct. 614, Reap. Dec. 5062; *Japan Import Co.* v. *United States,* 1 Cust. Ct. 607, Reap. Dec. 4389, affirmed in 2 Cust. Ct. 926, Reap. Dec. 4568; *Mitsubishi Shoji Kaisha, Ltd.* v. *United States,* 1 Cust. Ct. 728, Reap. Dec. 4444, affirmed on the question of comparability of the shoes in 2 Cust. Ct. 935, Reap. Dec. 4570; *K. Samura Shoten, Ltd.* v. *United States,* 1 Cust. Ct. 713, Reap. Dec. 4437; *Pacific Trading Co.* v. *United States,* 3 Cust. Ct. 580, Reap. Dec. 4649; *Bata Shoe Co.* v. *United States,* 73 Treas. Dec. 1600, Reap. Dec. 4330; *New York Merchandise Co., Inc.* v. *United States,* 73 Treas. Dec. 1480, Reap. Dec. 4279. And see to the same effect, *Mutual Supply Co.* v. *United States,* 18 Cust. Ct. 338, Reap. Dec. 6809, reversed on other grounds on the issue of camparability in 20 Cust. Ct. 418, Reap. Dec. 7578, affirmed in 38 CCPA 44, C. A. D. 437. And it appears that our appeals court is inclined to the same view in proclamation cases. *Mutual Supply Co.* v. *United States, supra* (C. A. D. 437); *Japan*

Import Co. v. *United States, supra.* In the last cited case, our appeals court, in coming to grips with the issue in the case, stated (page 175):

> Under the proclamation of the President and said section 336 (a) and (b), the appraisement of the imported goods was to be made at the American selling price of the domestic article like or similar to imported foreign articles, as defined by said section 402(g). *Were the imported goods like or similar to the goods used by the appraiser in ascertaining value?* * * * [Emphasis supplied.]

I believe that had our appeals court in *Japan Import Co.* v. *United States, supra,* been of the opinion that more was required to successfully challenge the appraisement in that case it would have said as much. Therefore, in view of the foregoing authorities and considerations, I conclude that appellant was under no duty to adduce any other evidence on the subject of domestic counterpart shoes other than that which was necessary to overcome the validity of the appraisers' selection and valuations. Appellant, having done that, and there existing in the record a basis for valuation of the involved merchandise, including merchandise covered by entries where appraisement was "void" for reasons herein stated, export value as stipulated by the parties should have been adopted by the court below as the basis for reappraisement of the subject merchandise.

For the reasons stated, I would reverse the judgment of the court below and enter the judgment which should have been entered by that court as per stipulation of the parties, in the event that the American selling price basis of valuation is not applicable.

APPENDIX D

Decision of the Customs Court

(Reap. Dec. 11095)

A. ZERKOWITZ & Co., INC. *v.* UNITED STATES

Reappraisement R60/20082-7201 and three others

Entered at New York, N. Y.; Baltimore, Md.; and San Francisco, Calif.
Entry No. 961416, etc.

(Decided October 27, 1965)

NICHOLS, Judge: The merchandise involved in these appeals, consolidated at the trial, consists of footwear with cotton canvas uppers and with soles in chief value of rubber or substitutes for rubber, imported from Japan during the years 1958, 1959, and 1960. In accordance with Presidential Proclamation No. 2027, dated February 1, 1933, 63 Treas. Dec. 232, T. D. 46158, and in view of the fact that this merchandise was included in the final list published by the Secretary of the Treasury, 70 Stat. 948, 93 Treas. Dec. 14, T.D. 54521, pursuant to the Customs Simplification Act of 1956, it was appraised on the basis of the American selling price, as defined in section 402a(g) of the Tariff Act of 1930, as amended by said Customs Simplification Act. It is claimed that the proper basis of appraisement is export value, as that value is defined in section 402a(d) of said tariff act, as amended.

This case was originally tried and submitted before the late Judge Mollison in 1961. By order, dated February 15, 1962, he set aside the submission and restored the case to

the calendar. *A Zerkowitz & Co. Inc.* v. *United States*, 48 Cust. Ct. 559, Reap. Dec. 10175. In his memorandum, he noted that the proof offered by the plaintiff was directed toward establishing that the "Rover" tennis oxford, selected by the appraiser as the domestic article whose selling price should be taken as the value of the imported article, was not like or similar thereto. He then stated (pp. 561-562):

> Even were the court to find that the "Rover" tennis oxford was not like or similar to the imported footwear, or that the conditions under which it was offered and sold did not conform to the terms of the American selling price statute, such a finding would not automatically establish that the Presidential proclamation was inapplicable to the valuation of the merchandise. The imported merchandise is of the description of that covered by the proclamation, requiring such merchandise to be appraised on the basis of American selling price. As has been said, to eliminate the imported merchandise from the purview of the proclamation, proof (or a substitute therefor) would have to be adduced [by plaintiff] that no other domestic article to which the imported article was like or similar existed at the pertinent times, or, if such an article existed, that its price did not reflect the terms and conditions of the American selling price formula.
>
> * * * * * * *
>
> Moreover, the court observes that, even if it were found that the Presidential proclamation was inapplicable to the valuation of the merchandise at bar, the record does not establish the correct basis of value applicable thereto.

Thereafter, much additional evidence was presented at hearings at various ports and the case was submitted before me on October 16, 1964.

Presidential Proclamation No. 2027, *supra*, covers footwear subject to duty under paragraph 1530(e) of the Tariff Act of 1930, and provides in part:

> * * * tha the rate of duty shown by said investigation to be necessary to equalize such differences, within the limit provided in said section 336, on boots, shoes, or other footwear (including athletic or sporting boots and shoes), the uppers of which are composed wholly or in chief value of wool, cotton, ramie, animal hair, fiber, rayon or other synthetic textile, silk, or substitutes for any of the foregoing, with soles composed wholly or in chief value of india rubber or substitutes for rubber, is 35 per centum ad valorem based upon the American selling price as defined in section 402(g) of said act of boots, shoes, or other footwear (including athletic or sporting boots and shoes, the uppers of which are composed wholly or in chief value of wool, cotton, ramie, animal hair, fiber, rayon or other synthetic textile, silk, or substitutes for any of the foregoing, with soles composed wholly or in chief value of india rubber or substitutes for rubber, manufactured or produced in the United States; * * *.

The first claim made by the plaintiff is that this proclamation was rendered inoperative by the later modification of paragraph 1530(e) by the Protocol of Terms of Accession by Japan to the General Agreement on Tariffs and Trade, T.D. 53865 (hereinafter referred to as the Japanese Trade Agreement). Said proclamation had been issued under the authority of section 336 of the Tariff Act of 1930, and no claim is made that it was not authorized by

the statute or that it was not in effect before the Japanese Trade Agreement, which was made in 1955. What is claimed is that it became inoperative when that agreement became effective, because of the following language in section 350(a) 2(a) of the Tariff Act of 1930 (19 USC § 1352):

> * * * The provisions of sections 336 and 516(b) of the Tariff Act of 1930 shall not apply to any article with respect to the importation of which into the United States a foreign-trade agreement has been concluded pursuant to this act, or to any provision of any such agreement. * * *[1]

Plaintiff construes this section not only as prohibiting the initiation of section 336 proceedings as to any article covered by a future trade agreement but as relating back to any Presidential proclamation already in effect under section 336, and rendering it inoperative whenever a trade agreement should thereafter include an article embraced by such proclamation.

If one ignored all that had happened respecting the employment of American selling price valuation for rubber-soled footwear in the last 30 years, the argument might, by one inclined to generosity, be called plausible.

In *Albert F. Maurer Co.* v. *United States*, 47 Cust. Ct. 560, Reap. Dec. 10130, affirmed 50 Cust. Ct. 539, A.R.D. 153, affirmed 51 CCPA 114, C. A. D. 845, there were involved rubber overshoes covered by foreign trade agreements but appraised on the basis of the American selling price. Judge Donlon noted section 350(a), 2(a), *supra*, and stated (p. 575):

> Rubber overshoes are included in such foreign trade agreements. Counsel raise no issue as to the above

[1] Said section was later amended to delete reference to section 516(b), 65 Stat. 72, 75.

provision, either in their statements to the court or in their briefs. This is doubtless because the authority to conclude foreign trade agreements is prospective in its impact on section 336. The Presidential proclamation, under which these rubbers were appraised, antedates the enactment of section 350(a).

This has resulted in the continuing valuation of imported merchandise, notwithstanding trade agreements, on the basis of competitive conditions that were found to exist over three decades ago. Whether Czechoslovakia is any longer the "principal competing country" producing rubber overshoes, it is not our province to consider. One consequence of what may be an inequity, due to elapse of a considerable period of time and change in competitive conditions, has been the substantial increase in litigation before this court, challenging appraisements that are being made on the basis of American selling price pursuant to long ago Presidential proclamations. Whether or not there is such inequity, is a political issue that only Congress can decide. It is not an issue appropriate for court decision.

Whether American selling price appraisement is desirable as a matter of trade policy (and whether it should be permanently employed on the basis of possibly ephemeral conditions) are not for this court, and counsel in their briefs have properly not discussed any such questions. The law prescribes such appraisement under certain circumstances, and the duty of this court is solely to determine if the circumstances exist, applying the law according to the facts and the intent of the lawmaker. The decision herein undertakes to do this.

The broad purpose of the Trade Agreements Act of 1934 and its subsequent extensions (section 350(a) of the Tariff Act of 1930, as amended, 19 USC § 1351, as amended) was to expand the foreign trade of the United States by permitting the President to enter into reciprocal trade agreements with other nations by which existing duties or import restrictions would be modified within the limits provided. *Star-Kist Foods, Inc.* v. *United States (Bruno Scheidt, Inc., Party in Interest)*, 47 CCPA 52, C. A. D. 728. Section 350(a) 2(a) was included in order that trade agreement concessions might not be nullified through the procedure provided in section 336. Existing proclamations would not have this effect since they would be known to the parties when trade agreements were negotiated and conditions under them would be the basis of negotiation. Where a rate of duty has been increased by a Presidential proclamation under section 336, it may be reduced by a trade agreement entered into under the authority of section 350(a), but if the trade agreement is terminated, the rate of duty reverts to that provided for in the Presidential proclamation. *Barclay & Company, Inc.* v. *United States*, 47 CCPA 133, C. A. D. 745. The section 336 proclamation is not abrogated by the trade agreement or the proclamation proclaiming it, but is merely suspended.

Here, the parties to the involved trade agreement, not only knew about the Presidential proclamation, but considered it still in force and still requiring appraisement to be on the basis of American selling price. Paragraph 1530(e), as modified by the Japanese Trade Agreement, provides:

> Boots, shoes, or other footwear (including athletic or sporting boots and shoes), the uppers of which are composed wholly or in chief value of wool, cot-

ton, ramie, animal hair, fiber, rayon or other synthetic textile, silk, or substitutes for any of the foregoing:

With soles wholly or in chief value of india rubber or substitutes for rubber..... 20% ad val.

NOTE: The duty on the foregoing articles is to be calculated on the basis specified in T. D. 46158.

If the basis of appraisement made effective by Presidential Proclamation No. 2027 might have been changed by following the procedure provided for in section 336(f), this has not been done. Whether or not the President could have made such a change by means of a trade agreement need not here be determined. His authority under the Trade Agreements Act, as amended (19 USC § 1351), grants him power:

(a) • • •

(1) • • •

(A) • • •

(B) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

(2) No proclamation pursuant to paragraph (1) (B) of this subsection shall be made.

• • • • • • •

(C) In order to carry out a foreign trade agreement entered into by the President before June 12, 1955, or with respect to which notice of intention to negotiate was published in the Federal Register on November 16, 1954, decreasing by more than 50 per centum any rate of duty existing on January 1, 1945.

* * * * * * *

It would, however, be surprising for a President to effect such a change without notice; or with notice that such a change had not been made. Whatever changes he makes, he must "proclaim." If the modification to paragraph 1530(e) by the Japanese Trade Agreement is construed to make a change in the basis of appraisement as well as to reduce the rate of duty, the total reduction might be beyond the limits allowed to the President under the above section. No President, we are sure, has been or will be so poorly advised as to do such a thing by inadvertence.

The Congress twice amended paragraph 1530(e), in 1954 (68 Stat. 454) and in 1958 (72 Stat. 185). Both were for the purpose of closing loopholes through which importers were avoiding American selling price appraisement, or so it was thought. For one example of such avoidance, *cf. A. Zerkowitz & Co., Inc.* v. *United States,* 54 Cust. Ct. 151, C. D. 2525, appeal dismissed August 4, 1965. In the 1954 amendment, the Congress said: "For the purposes of this paragraph and any existing or future proclamation of the President relating thereto * * *." There can be no doubt that this amounted to a congressional adoption and ratification of Presidential Proclamation No. 2027, *supra,* when it is considered with the context and purpose of the amendment. The reports show that the 1958 amendment was predicated on congressional awareness that the American selling price appraisement had not been broken

off by the Japanese Trade Agreement of 1955, but remained effective in practice, except for the loopholes the Congress sought to close. Report of Ways and Means Committee to accompany the bill (H. R. 9291), T. D. 54659; Report of the Senate Finance Committee, United States Code Congressional and Administrative News, volume 2, 85th Congress, page 2635. These reports point out that, subsequent to the Japanese Trade Agreement, importers have been avoiding the appraisement of rubber-soled footwear on the basis of American selling price by adding pieces of material to make the footwear in chief value of leather or the uppers in chief value of leather. The purpose of the proposed amendment was stated to be to define further the footwear covered by paragraph 1530(e), which was subject to duty at ad valorem rates based on the American selling price of the domestic article.

In the Tariff Classification Study made pursuant to title I of the Customs Simplification Act of 1954, it is noted that the Presidential proclamation issued under section 336 gave increased tariff protection to rubber footwear by changing the basis of valuation to the American selling price. Tariff Classification Study, November 1960, schedule 7, page 18. The study also stated:

> So far as is known to the Commission almost all the products of the rubber footwear industry were until recent years of a kind covered by the increased tariff, protection afforded by the above-mentioned proclamation under section 336. In recent years, however, there have been imports of footwear which have the appearance and are in fact of a kind made by the domestic rubber footwear industry, but which, by some relatively minor change in construction, have avoided classification for duty purposes under the tariff pro-

> visions established by the 1933 proclamation. The Congress has twice enacted legislation "to close a loophole in the tariff laws by which foreign producers are, by artful manipulation of a product, avoiding an import duty imposed specifically for the protection of the domestic rubber-soled footwear industry."

While the footwear provisions in the Tariff Schedules of the United States are different, some items are still subject to appraisement on the basis of American selling price. See schedule 7, part 1, subpart A, headnote 3(b):

> Subject to the provisions of section 336(f) of this Act, the merchandise in item 700.50, if the rubber portion thereof is wholly, or over 50 percent by weight, of natural rubber, and in item 700.60 shall be subject to duty upon the basis of the American selling price, as defined in section 402 or 402a of this Act, of like or similar articles manufactured or produced in the United States.

The unbroken practice of the Executive, the Congress, and our court, are contradicted only by plaintiff's debatable grammatical construction. I conclude that Presidential Proclamation No. 2027 has not been abrogated or suspended and that, if such as the instant merchandise was ever covered thereby, it was still subject to appraisement on the basis of the American selling price on the date of importation.

Although the proclamation is in broad language covering all of a general class or type of shoe (footwear with uppers of wool, cotton, or other textile and soles of rubber or rubber substitutes), the language of section 336 indicates there must be, and courts determine whether there is, a "like or similar" domestic shoe which is "competitive"

with the imported article, in order for the proclamation to apply. *H. H. MacDonaugh & Co. and The Mutual Supply Co.* v. *United States,* 38 CCPA 36, C. A. D. 436; *Mutual Supply Co.* v. *United States,* 5 Cust. Ct. 614, Reap. Dec. 5062; *K. Samura Shoten, Ltd.* v. *United States,* 1 Cust. Ct. 713, Reap. Dec. 4437; *United States* v. *Japan Import Co., Inc.,* 2 Cust. Ct. 926, Reap. Dec. 4568; *Geo. S. Bush & Co., Inc.* v. *United States,* 43 Cust. 577, Reap. Dec. 9563, affirmed 46 Cust. Ct. 754, A. R. D. 126; *Albert F. Maurer Co.* v. *United States, supra.* In the case last cited, the court of appeals noted that the true question was whether, in order to carry out the intent of Congress, it should be held that the foreign and domestic rubbers there involved were legally "similar," notwithstanding their differences. It added (p. 119):

> * * * If the collector can find no American article sufficiently similar to the one imported to create market competition with it, obviously no one is going to be disadvantaged, there is no point in applying the proclamation, and as a matter of law it would not apply. On the other hand, where imports are sufficiently similar to American goods to compete directly with them, and the goods are within a category named in the proclamation, it would seem to be within the intent of Congress that they receive the protection the proclamation was intended to afford. The whole scheme was to protect specified American manufacturers whenever and if foreign competing merchandise came in by charging the latter with an ad valorem duty based on American selling price of the American-made protected articles, in the words of the statute itself, in order to "equalize the differences in the cost of production of the domestic article and the like or similar foreign article * * *"

Some items of footware have been held not subject to appraisement on the basis of American selling price, on the ground that the domestic shoe was not "like or similar": Rubber-soled cotton socks, called tabis; rubber-soled oxfords with toyo paper uppers which became separated from the soles when wet, so that they were incapable of the same use as the domestic shoes; rubber-soled shoes with cotton uppers used for farm work. *K. Samura Shoten, Ltd.* v. *United States, supra; United States* v. *Japan Import Co., Inc., supra; Mutual Supply Co.* v. *United States, supra,* respectively. In the toyo paper case (*Japan Import, supra*), the shoes were unmerchantable, 90 per centum being returned by the buyers. Whether the case should be followed with respect to a merchantable shoe may be considered open. On the other hand, a number of rubber-soled shoes with canvas uppers have been held like or similar to domestic articles. *Japan Import Co.* v. *United States,* 24 CCPA 167, T. D. 48642; *H. H. MacDonaugh & Co. and The Mutual Supply Co.* v. *United States, supra; Stanley Weiner* v. *United States,* 51 Cust. Ct. 353, Reap. Dec. 10572, rehearing denied, 51 Cust. Ct. 419, Reap. Dec. 10599. In *Albert F. Maurer Co.* v. *United States, supra,* domestic and imported rubbers were held to be similar.

It has also been held that where there is a "like" domestic article, its selling price must be used in preference to that of a "similar" domestic article. *Hoyt, Shepston & Sciaroni* v. *United States,* 38 Cust. Ct. 741, A. R. D. 74, appeal dismissed 45 CCPA 129; *Geo. S. Bush & Co., Inc.* v. *United States,* 48 Cust. Ct. 689, A. R. D. 140, appeal dismissed 49 CCPA 139.

The remaining issues here are (1) whether the U. S. Keds "Rover" used by the appraiser as the domestic article whose price represented the American selling price is like

or similar to the imported article; (2) whether the selling price of the U. S. Keds "Rover" reflected the terms and conditions of the American selling price formula, and, if not, (3) whether any domestic shoe like or similar to the imported merchandise existed, and whether its price reflected the terms and conditions of the American selling price formula.

Whether or not items of foreign and domestic footwear are "like or similar" have been before the courts on a number of occasions and guidelines have been indicated for the determination of the question.

In *Japan Import Co.* v. *United States, supra,* in finding the domestic and the imported articles similar, the court stated (pp. 174-175):

> * * * The testimony shows that the imported shoes sold variously from 35 cents to 50 cents a pair at wholesale. The usual price for the domestic shoes, at the time of importation, was approximately 69 cents a pair wholesale. Some testimony was offered to the effect that the domestic product in some cases was of a better quality than the imported shoes; for instance, some of these domestic articles were said to have a cloth upper which permitted the passage of air, thus ventilating the shoe. The insoles were said to be closer fitting and the cross corrugations on the soles of better quality. It was also claimed that the soles of some of the domestic shoes were more flexible. The evidence, however, did show that the imported shoes and the domestic shoes were sold in the same establishments, to the same class of customers, and were adapted for the same uses and purposes. The witnesses differed to some degree as to whether they considered the imported and domestic shoes to be similar, some expressing the opin-

ion definitely that they were similar for selling purposes, while others had the contrary opinion.

On the other hand, the shoes in *Mutual Supply Co.* v. *United States, supra,* were found to be dissimilar because not commercially interchangeable, not sold in the same stores, not used by the same class of people, and not of the same quality, and because one was adapted for use by farmers and the other not.

In *Albert F. Maurer Co.* v. *United States, supra,* the domestic and foreign rubbers differed in numerous mechanical and functional details, such as weight, hardness, antiskid force, holding properties, and lip opening. The foreign article was in a "modern" design, whereas the domestic rubber had an entirely conventional appearance. The court noted that a purchaser who had decided on one might not be satisfied with the other but that both served the same purpose, to keep the feet dry. They were made of substantially the same material and were flexible enough to stuff in a case or pocket. The difference in hardness would not be apparent to the average customer. They were held to be "similar," notwithstanding their differences.

In the instant case, samples of the imported shoe (plaintiff's exhibit 9) and of the U. S. Keds "Rover" (plaintiff's exhibit 6, hereinafter called the Rover) have been received in evidence. Both are of the type commonly known as tennis oxfords or sneakers. According to one witness, canvas upper shoes are called tennis shoes by the manufacturer because they are made by tennis manufacturing methods. The Rover was more particularly described as a circular vamp oxford. In appearance, the two samples are very similar. Both have colored canvas uppers and rubber or composition rubber soles. The chief apparent difference is that the Rover has a flat "pebbled" sole, whereas the im-

ported shoe has a "checkerboard" sole and a "ridged" heel, and is more flexible.

The plaintiff had tests made of the imported shoe and the Rover by the United States Testing Co., the results of which appear in the testimony of Paul S. Marois, textile engineer, and in plaintiff's exhibit 1. They show that there were differences in construction in the two shoes; that the imported shoe was more skid-resistant, but the Rover had a higher resistance to wear and was stronger in other respects. The witness testified that if the construction features of the domestic article were assigned an arbitrary numerical value of 100, then a value of 70 should be assigned to the construction features of the imported article.

The sole of the imported shoe was designed to be skid-proof and for wearing on asphalt and concrete and the design had been patented. There was testimony that similar designs were used on soles and heels of domestic canvas top, rubber-soled oxfords and that, as long as the surface was broken, they were skid-resistant. According to one witness, the pebble-type sole also has nonskid features but it is not as nonskid as a sole with ridges. There was no clear showing that either shoe is better than the other in this regard, or that many purchasers would accept one shoe and reject the other, on account of the difference.

Mr. Zerkowitz testified:

> Exhibit 9 is a cheap shoe without any cushion insole, without any arch support, not suitable for people who are accustomed to wear shoes with cushion insole and with arch support.

However, exhibit 9 itself contains the words "Built-in Arch" on the insole. One witness said this exhibit had a "simulated support."

Other witnessses for plaintiff testified that the sole of the imported shoe was thinner; that the canvas was of a lighter, cheaper kind; that the shoe did not have the same cushioning and arch features as the Rover; and that it was of inferior quality. Witnesses in the shoe business testified that exhibit 9 would not be a valid replacement for exhibit 6, because it was of inferior quality and would have to be sold at a lower price.

Defendant's witness, Harold N. Barrett, vice president and general manager of the Footwear & General Products Division of the United States Rubber Co., testified as to the differences and similarities of the two articles:

> Well, they're both made with what we call enameling duck uppers. They're both backed with a twill backing. I wouldn't be able to tell you the exact weight without an analysis of them, but they are very similar as regards the count, from a visual appearance. They both have hard insoles; they both have the same type outsoles, rubber-compounded outsoles. They both have foxing. They are made with three-piece uppers. They each have a vamp to quarter. They're stitched up the back by the very same methods of stitching. They both have counters in them; they both have counter binds. They have eyelets. This little one happens to have one less eyelet, but they do have eyelets. They both have laces. In fact, they are the same as each other. They are very similar.

Abraham Alexander, customs examiner of footwear before his retirement, testified that the articles were made of similar material and had calendered rubber soles of different design. The testimony of James H. Hanson of the United States Rubber Co. is to the same effect.

There was evidence that exhibit 9 would not be permitted on grass, clay, or composition tennis courts, but that exhibit 6 would be permitted on composition courts. A witness testified, however, that there is great disparity around the country as to what type of shoe is allowed on what kind of court, and another that "tennis shoe" is a "generic or misnomer term," by which he meant, apparently, that the chief use is not for playing tennis. There was evidence of other patterns specially designed for that.

The test laid down in *United States* v. *Wecker & Co.*, 16 Ct. Cust. Appls. 220, 225, T. D. 42837, is as follows:

> The individual differences between the foreign-market products and those imported in texture, workmanship, or structure might not be, in themselves, sufficient to prevent the goods from being similar. * * * The question of similarity is, in each case, to be measured by much the same homely rule that applies to the prospective customer who enters a store seeking some utilitarian article of a certain specified name and style; he finds the article requested is not in stock but that another article, of approximately the same price and which will perform the same functions is capable of the same use and may be substituted therfor, is available. Such an article is a similar article, notwithstanding the price, the methods of construction, and the component materials may be somewhat different; but, for all utilitarian purposes, one is a substitute for the other. * * *

This case did not involve American selling price valuation, but the above language has been quoted in cases that did. *Mutual Supply Co.* v. *United States*, 38 CCPA 44, 47, C. A. D. 437; *Albert F. Maurer Co.* v. *United States, supra* (47 Cust. Ct. at pp. 573-574).

The dissimilarities relied on by plaintiff herein, may be stated to be the differences in (a) price, (b) quality, (c) advertising, and (d) retail sales outlets employed. I take them up in order.

(a) Price. The imports sold at prices ranging from 60 cents to $1.15 per pair, whereas the Rover sold for prices ranging from $2.05 to $2.65 per pair. Several witnesses stated that because of the price differential, the two articles are sold to different types of customers. According to a marketing expert, Paul H. Nystrom, such articles occupy quite different fields; they may overlap a little but they do not compete. The price range between the import and the Rover is very wide, wider than in any reported case under the proclamation that I have noticed. However, as to price, the shoe selected as the United States counterpart is typical of the lowest price line of about 10 United States manufacturers. There can be no suggestion that a premium or luxury shoe was arbitrarily selected as a counterpart. Since no claim is made that the import was "dumped," it is to be presumed the price differences are due mainly to lower cost of production, to inferior quality, and to the import not being advertised, but what part of the difference may be assigned to each factor does not appear. The court declined to go into actual advertising costs of the Rover. As to cost of production, considering, as I must, the purposes of the proclamation and the solicitude the Congress has displayed about it, it would certainly seem that the wider the difference in cost of production, the more the case is within the intent of the proclamation. Price differences due to quality differences and advertising are discussed under those headings.

(b) Quality. With respect to quality, the evidence was in conflict. Assuming, *arguendo*, that if the Rover is rated

at 100, the import is 70, this would not prevent the import from offering highly effective competition when, as here, the price variation was, percentagewise, even greater. The samples, which are "potent witnesses" (*United States* v. *The Halle Bros. Co.*, 20 CCPA 219, T. D. 45995; *Marshall Field & Co.* v. *United States*, 45 CCPA 72, C. A. D. 676), tell us that to the untutored eye the shoes look much alike. Even to well-heeled buyers, the cheaper shoe with more frequent replacement would be an attractive proposition, particularly for growing children and for uses which dirtied up the shoe rapidly. There was no really serious contention that for foot health, either shoe offered anything not offered by the other. Constant wear of either shoe by a person with arch trouble would hardly be advisable, one supposes. All things considered, I find that the inferiority of the import, if any, resides chiefly in lesser durability, and I do not believe that, for purposes of the proclamation, even a very much greater difference in durability than is here alleged would make the articles not "similar."

(c) Advertising. One of the important differences in the marketing of the two articles is that the Rover is one style in the line covered by the registered brand name "U. S. Keds," which is extensively advertised by the United States Rubber Co. Display exhibits advertising products bearing the "U. S. Keds" label were supplied by the United States Rubber Co. to its customers. On the other hand, the plaintiff did not advertise the imported shoe or supply exhibits or advertising material to its customers. The presence of an unknown advertising component in the producer's budget is not fatal to similitude. It is well known that large advertising expenses may make it possible to sell a product cheaper, because of larger production runs. Whether this is so in the case of the Rover, or partly so, or

not so at all, we do not inquire, as it is a collateral issue; at any rate, a decision to advertise is made in the hope it will be so. Advertising is a natural and needed defense of the domestic producer against cheap competition, foreign and domestic. We frustrate the proclamation, in part, if we say that if an import is not advertised, a counterpart may be sought only among unadvertised domestic products; we withdraw protection from the producers who need it most.

Courts have frequently considered whether prices realized by branded merchandise may be used in the appraisement of otherwise similar unbranded counterparts. See *Chr. Bjelland & Co., Inc.* v. *United States,* 52 CCPA 38, C. A. D. 855; *Page & Jones, Inc., et al.* v. *United States,* 53 Cust. Ct. 363, Reap. Dec. 10788 (application for review pending), discussions therein, and cases cited. However, counsel have called attention to no such case involving use of the American selling price method, and I have found none. Cases under the other statutory valuation methods are not, I believe, controlling herein. Here, the issue is "one of economics, not semantics" (*Maurer, supra,* at p. 119), and, one may add, the intent of the Congress. The other valuation methods are formulae, to determine, within minor variations, the value of the merchandise under appraisement, using "similar" merchandise merely as a measure. There it would be a very serious question, to enhance the value of the import by reason of branding and advertising applicable to other products, from which it derives no benefit. But the American selling price method does not pretend to determine the value of the import, either before or after importation. Often no willing buyer would pay, and no seller would have the face to demand, the "value" assigned an import by that formula. The import is "appraised" according to the value of something else, and thus, of necessity,

the appraisal must often reflect elements of value of many kinds in which the import does not share. Plaintiff cannot complain of unfairness, for the Congress, which could have totally embargoed merchandise such as that before us, has instead elected merely to employ this method to make its importation financially onerous. See discussions in *Kuttroff, Pickhardt & Co.* v. *United States*, 12 Ct. Cust. Appls. 299, 302, T. D. 40313; *Japan Import Co.* v. *United States*, *supra*, at page 170.

(d) Retail outlets. The manufacturer sold the Rover directly to retail outlets, except in the case of two distributors through whom it sold to retailers in Norfolk, Va., and Sacramento, Calif. It did not, except for these two, as a matter of policy, seek to sell to jobbers, distributors, or discount houses. The retailers had "suggested" pricelists sent them, but were not required to sell at those prices or were otherwise restricted. Zerkowitz sold to wholesalers, jobbers, and discount houses, and the merchandise, it is claimed, reached the consumer through five and tens, discount houses, and bargain basements. There is evidence here that U. S. Keds and the imported merchandise were displayed and sold in some of the same stores and sold to any customers who came in, but there is also evidence that the imported merchandise was sold to a different class of customer; and that U. S. Keds were not sold to F. W. Woolworth, H. L. Green, J. C. Penney, the Newberry Stores, S. H. Kress, or E. J. Korvette or other discount houses, as the import was. The evidence does not establish, however, that the Rover and the import were never available in the same stores (one witness, a retailer, testified he sold both), and to prove such a thing even generally true would seem almost impossible, considering the multiplicity of retail outlets for rubber-soled, canvas upper footwear. The court

does believe, and finds, that a larger portion of the imports reached the consumer through outlets, such as discount houses, that appealed to consumers primarily interested in the lowest price, than was the case with the Rover. It must be realized, however, that both shoes, much as they differ in price from one another, are at the lower end of the price range, if we consider all footwear, and the claimed durability of the Rover might appeal to many budget conscious persons. Some court decisions seem to say that a counterpart, to be competitive, must be sold through the same retail outlets. (*Mutual Supply Co.* v. *United States, supra; United States* v. *J. J. Boll et al.,* 53 Cust. Ct. 523, A. R. D. 179, appeal dismissed September 23, 1964.) It is easy to see that if an import was sold only in religious supply houses, and the alleged counterpart only through sporting goods establishments, skepticism as to competitiveness would be warranted. When the outlets differ, however, primarily in the degree to which they cut prices, or claim they do, the difference in outlet is simply a function of the difference in price, and price is the life of competition. The Nieman Marcuses, Brooks Brothers, or Abercrombie & Fitches of this world would indeed be surprised to be told they received no competition from cheaper discount houses. No customer is so wealthy he does not look for a bargain once in a while. The finest stores (not those named above) run bargain basements and occasionally they announce sales, at which times, if rumor is correct, the high-quality merchandise may be secreted in the warehouses and poorer stuff finds its way to the counters. Occasionally, too, high-price stores dispose of slow-moving merchandise to lower price outlets. Not only is it impossible to find that the imports *never* competed with the alleged counterparts on the shelves of the same stores, but to the extent the competition was at

a distance of around the corner, or from first floor to basement, it is impossible to see the relevance of the fact. Only one case has been found which refers to employment of different retail outlets as one—but only one—of the determinative factors in finding lack of similarity: *Mutual Supply Co.* v. *United States, supra,* in which the import was a shoe of peculiar design used in the United States only in the rural parts of California and only by Japanese and Philippine farm laborers. Therefore, naturally, it was sold only in Japanese stores, dry goods stores, and grocery stores, in the rural districts, where the domestic alleged counterparts were not sold. The facts in the instant case are entirely different. It is conceivable—though not this case—that an importer might find means of marketing his product through a retail chain that handled no domestic brand, but, even then, I question if such fact would compel a finding of absence of competition, and, therefore, of "similarity," if the domestic counterpart was otherwise alike.

The difference in price, relied on to establish dissimilarity, thus fails to do it. We do not find any decision of our appellate court saying that products are dissimilar under the laws here to be construed if the import is very much lower in price; if our own court has so stated, I believe it inadvertent, and for reasons already indicated, the proposition is absurd. To the extent the difference results from lower cost of production, this is the very case the proclamation is aimed at. To the extent it reflects poorer quality, not enough difference in quality is here shown to negative appeal of both products to the same buyers, considering that the same buyer might accept a good product or a poorer product at a lower price. To the extent it reflects a different advertising policy, the purposes of the proclamation require that the difference be allowed for.

The difference in retail outlets is not conclusively established and is not relevant when, as here, such difference as exists is a function of the difference in price and does not reflect difference in end uses. Thus, the appraiser's finding that the Rover is similar to the import is not refuted and must stand.

The court must next find the American selling price of the Rover. *Kuttroff, Pickhardt & Co.* v. *United States,* 13 Ct. Cust. Appls. 17, 21, T. D. 40861. American selling price is defined in section 402a(g) of the Tariff Act of 1930, as amended, as follows:

> (g) The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale for domestic consumption to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold for domestic consumption in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.

Under this definition, American selling price may be determined in three ways: (1) By the price at which the domestic article is freely offered for sale to all purchasers in the principal market, in the ordinary course of trade and in the usual wholesale quantities, or, alternately, (2) by the price that the manufacturer, producer, or owner would have received, or (3) would have been willing to receive for such

merchandise when sold in the domestic market in the ordinary course of trade and in the usual wholesale quantities. *Kuttroff, Pickhardt & Co. v. United States, supra; H. H. MacDonaugh & Co. and The Mutual Supply Co.* v. *United States, supra; Hudson Shipping Co., Inc.* v. *United States,* 43 CCPA 19, C. A. D. 604. In the case last cited, the court said (p. 30):

> In this case, from the evidence introduced, it seems clear that the appraiser would have had no difficulty in determining the price which the American producers not shown to have sold their product "would have received" or were "willing to receive." As a basis he had the price that was being received upon valid contracts by the "major" producers, the price that was being quoted for future delivery by one of the major producers, and the price at which the foreign product was being sold. The appraiser would have been justified in using any of this data in finding the price the American producer or owner would have received had he placed his product for sale. Since appellant has offered no evidence tending to negative the possibility of a correct American selling price appraisal under the second part of section 402(g), it follows that he has not overcome the presumption of correctness attaching to the appraiser's valuation and has not made out a *prima facie* case.

The alternate parts of the American selling price formula do not require that the domestic merchandise be freely offered to all purchasers, but only that there be a price which a manufacturer, producer, or owner would have received or been willing to receive in the ordinary course of trade for the usual wholesale quantities. In the instant case, the record establishes that the Rover was offered and

sold to retail stores and to two wholesalers, but not to other wholesalers or jobbers. In the ordinary course of trade, the manufacturer sold to retailers at list prices, less 2 per centum. The usual wholesale quantity appears to be 1 pair or 12 pairs. The company will sell 1 pair, but a 50-cent service charge is made for orders of less than 12 pairs. There were quantity and seasonal discounts and a special discount for the two wholesalers. It is clear that the manufacturer was willing to receive the list prices, less 2 per centum, for the Rover shoe.

In the *MacDonaugh* case, *supra,* which also involved a shoe made by the United States Rubber Co., the court said (p. 43):

> From Pennington's testimony, it is apparent, we think, that the company which he represented was not actually *trying to sell,* in the region of which San Francisco was the principal market, shoes of the type here involved to any concerns other than retailers. In all the Pacific Coast region the company had just one jobber customer. It was located at Sacramento, California. There were other jobbers in the region. There is no evidence showing that salesmen called upon such jobbers, or that their patronage was sought by mail, or in any other manner, but, on the other hand, there is no evidence that any jobbers ever sought to become customers, or that the United States Rubber Company ever received an offer from any concern to purchase which it refused.
>
> Certainly all the pertinent testimony of Pennington and other witnesses is to the effect that the United States Rubber Company would have been "willing to receive" the list prices of the shoes (allowing discounts

as is customary in business transactions) "sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article." [Emphasis quoted.]

The facts in this case are not sufficiently different to distinguish the *MacDonaugh* case, which is controlling on this point. Apparently, the situation has not changed.

The statement that United States Rubber Co. does not sell to wholesalers, distributors (except two), or discount houses is that of its own officers, yet they deny they would refuse to sell to anyone who offered to pay the established price. What is meant, I believe, is that they refuse to wholesalers, etc. (except two), the special discounts normally expected by them, and without which they could not normally operate at a profit. If, however, under some unusual circumstances, a wholesaler wanted to buy Rovers at the retailer's price, he would be accommodated. A buyer does not have to prove he is a retailer, to have his order filled. Businessmen have difficulty at times perceiving the legal existence of a free offer to persons it is known will not buy. A freely offered price exists if offers at that price are made to all who are in the class of those likely to pay it, and no one willing to pay it is refused. *United States* v. *Glanson Co.*, 47 CCPA 110, C. A. D. 740; *Rico, Inc.* v. *United States*, 48 CCPA 110, C. A. D. 773; *Sani-Smoke, Inc.* v. *United States*, 50 CCPA 82, C. A. D. 825.

Even if it were found that the Rover shoe was not similar or that there was no American selling price for it, plaintiff's claim that the merchandise is dutiable on the basis of the entered value could not be sustained, unless I found that no other domestic article like or similar to the imported article existed or that if it did exist, that no American selling price could be found for it.

The proof here does not establish that no domestic shoe similar to the imported article existed, but indicates the contrary. For instance, Jacob Werbin, national sales manager of The Rubber Corp. of California, testified that his firm produced and sold rubber-soled canvas-top tennis oxfords similar to plaintiff's exhibits 6 and 9 during 1958, 1959, and 1960; that such shoes were very close to exhibit 9 (the imported article) because the purpose was the same, although the outsole and the foxing were different. Joseph Svoboda, vice president and treasurer of the Bata Shoe Co., Inc., said that exhibit 9 is similar to shoes produced by his firm. He stated that the material was about the same; the design on the sole was similar; the construction was similar; and the shoes could be used for the same purposes. John C. MacKinnon, general manager of B. F. Goodrich Co., testified that his firm produced and sold footwear similar to exhibit 9, with the same general type of sole and heel design, made of similar materials, and serving the same purpose. William H. Smith, president of Bristol Manufacturing Corp., testified that his company produced and sold rubber-soled canvas-top tennis oxfords like or similar to plaintiff's exhibit 9. Wallace E. Brimer, president of Tyer Rubber Co., said that his firm produced and sold an article like or similar to exhibit 9, having similar material, construction, design of sole and heel, and having the same uses. There are about 20 major producers, of whom the majority were not covered by this kind of testimony.

Plaintiff claims, however, that none of these shoes could be used for the purpose of determining American selling price on the ground that they were not sold in accordance with the terms and conditions in section 402a(g), *supra*. Here, again, while it may be that not all of the products were freely offered and sold to all purchasers, there were

prices which the evidence indicated the manufacturers were willing to receive for them, or for shoes counterparts of the imports.

It is not necessary to make findings respecting shoes of other manufacturers, in view of my findings respecting the Rover, but the record is in existence and could be important if a reviewing tribunal took a different view than I do as to the validity of the appraisement based on the Rover. It was not contended that any of those other domestic shoes were identical to the import, as against being merely similar, as the Rover is, nor was any attempt made to show any of them were more similar than the Rover. Some of them may possibly have been "freely offered" at lower prices than the Rover, but no argument was made that among counterparts of equal similarity, the appraiser was required to select the one selling at the lowest price.

After the parties had rested and submitted, the late Judge Mollison, in a decision reported in 48 Cust. Ct. 559, Reap. Dec. 10175, *supra*, set aside the submissions and restored the case to the calendar. His statement of his reasons is quoted above. Thereafter, hearings were held at a number of ports and consideration was given to testimony offered by plaintiff which related to the products and selling practices of some manufacturers other than United States Rubber Co. Plaintiff, however, still insisted at the opening of the final hearing before me that by proving the appraisement based on the Ked Rover was invalid, it had shifted to the Government the burden of establishing that any other basis for American selling price appraisement existed.

There might possibly be some easier way of meeting plaintiff's burden as Judge Mollison stated it. The way plaintiff went about it makes the task appear impossible and Judge Mollison's view tantamount to an expression

that it is futile to challenge in court an American selling price appraisement of rubber-soled canvas upper footwear. Plaintiff, to prove its case, was required or supposed it was required to obtain the cooperation—voluntary or forced—of numerous parties having or supposing they had a large pecuniary interest in plaintiff's losing its case. This, of course, does not prove that Judge Mollison was in error; however, I believe that courts ordinarily frame rules as to burden of proof and burden of going forward on the basis of what will most readily get justice done. If it had been true that no American manufacturer sold or would have sold a shoe legally acceptable as a counterpart, the procedure employed was not well adapted to place the facts before the court in the form of competent evidence. The result I reach renders moot any question whether I would reaffirm or disavow Judge Mollison's rule, a question I would have had to decide had my analysis of the evidence respecting the Rover been different. American selling price appraisement and reappraisement I believe to be arts peculiar to themselves, and rules of substantive law, evidence, and procedure developed in other contexts all are to be applied with caution, if at all. The record herein ought not to be overlooked by anyone seeking to frame rules of procedure and burden of proof for American selling price cases.

For the reasons stated, the appraised values should be sustained.

I find as facts:

1. That the merchandise involved herein consists of so-called tennis oxfords, having uppers wholly or in chief value of cotton and soles wholly or in chief value of rubber, exported from Japan during 1958, 1959, and 1960.

2. That the imported merchandise was of the class or kind described in Presidential Proclamation No. 2027, dated February 1, 1933, 63 Treas. Dec. 232, T. D. 46158.

3. That the imported merchandise was of the kind described in paragraph 1530(e), Tariff Act of 1930, as modified by the Protocol of Terms of Accession by Japan to the General Agreement on Tariffs and Trade, T. D. 53865.

4. That the imported merchandise was appraised on the basis of the American selling prices of a circular vamp oxford produced by the United States Rubber Co., called the "Rover," a style in the line sold under the registered brand name "U. S. Keds."

5. That the Rover and the imported merchandise had a similar appearance, were made of similar material, were of similar construction, had substantially the same uses and purposes, and would compete for purchase by many of the same persons. That the Rover was heavily advertised and the imported article was not; that the Rover was somewhat superior in durability and sold at a higher price; that the channels of distribution were substantially but not completely different.

6. That, in the ordinary course of trade, the Rover was freely offered and sold only at list prices, less 2 per centum, the price not varying according to the quantity purchased, except for a surcharge of 50 cents for a purchase under 12 in quantity. That most sales were to retailers. That no additional discount was offered to wholesalers or jobbers, except for two in restricted category. That factory make-up discounts were allowed for orders accepted from August 1 through December 31, for shipment December 1 through April 25, and quantity discounts for at-once orders of 480 pairs or more in case of lots of 1 item.

7. That the manufacturer received or was willing to receive for the Rover, when sold in the ordinary course of trade and in the usual wholesale quantities at the time of exportation of the imported article, the list prices, less 2

per centum, which prices were equal to the appraised values.

I conclude as matters of law:

1. That Presidential Proclamation No. 2027 has not been abrogated or suspended by the modification of paragraph 1530(e), Tariff Act of 1930, by the Protocol of Terms of Accession by Japan to the General Agreement on Tariffs and Trade, T. D. 53865.

2. That the proper basis for determining the values of the imported merchandise is the American selling price, as defined in section 402a(g), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, 70 Stat. 948.

3. That the U. S. Keds "Rover" is similar to the imported merchandise.

4. That the American selling prices of the U. S. Keds "Rover" were those found by the appraiser.

5. That the dutiable values of the imported merchandise are the appraised values.

Judgment will be rendered accordingly.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-288

A. ZERKOWITZ AND CO., INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. The narrow question presented by the petition is whether tennis shoes which petitioner imported from Japan between 1958 and 1960 were properly appraised for duty purposes upon the basis of the American selling price ("ASP") of a like or similar domestic article (Pet. 5). Without dissent on this issue, the courts below, which were specifically established to resolve customs disputes, held that the ASP basis was proper. The issue is of limited significance

inasmuch as ASP valuation applies to only four products and, of these, only rubber-soled footwear is not subject to an international agreement to eliminate the ASP basis in return for reciprocal trade concessions. H.Rep. No. 91-1435, 91st Cong., 2d Sess. 51-52. Congressional authorization for modification of the tariff schedules to effect the agreements with respect to the other three products is now pending. See, *e.g.*, Section 331, H.R. 20, 92d Cong., 1st Sess.

2. In any event, the courts below correctly upheld the ASP valuation. In 1933, Presidential Proclamation No. 2027, 47 Stat. 2552, T.D. 46158, 63 Treas. Dec. 232, issued pursuant to 19 U.S.C. 1336, established ASP valuation for rubber-soled footwear of the type petitioner imported. The United States duty on such footwear imported from Japan was reduced to 20 percent ad valorem in 1955 by the Protocol of Terms of Accession of Japan to the General Agreement on Tariffs and Trade, 6 U.S.T. 5833, T.I.A.S. No. 3438, T.D. 53865, 90 Treas. Dec. 234. Petitioner contends (Pet. 5) that this trade agreement renders ASP valuation inoperative because 19 U.S.C. 1352(a) provides:

> The provisions of section 1336 of this title shall not apply to any article with respect to the importation of which into the United States a foreign-trade agreement has been concluded pursuant to this part * * *.

Petitioner also relies upon 19 U.S.C. 1402(a), which authorizes an ASP valuation only "[i]n the case of an article with respect to which there is in effect under section 1336 of this title a rate of duty based upon

the American selling price of a domestic article * * *" (Pet. 8).

In rejecting petitioner's contentions, the courts below properly held:

> The controverted portion of 19 U.S.C. 1352(a) is prospective, barring use of the section 1336 procedures to undo what has been done by a foreign-trade agreement; it does not, in itself, nullify changes in rates of duty, classification, or bases of appraisement brought about by previous use of the section 1336 procedures. [Pet. 5a; *see also*, Pet. 19a, 54a.]

As the courts below also held (Pet. 6a, 20a, 58a), the reduction in the *rate of duty* pursuant to the Japanese trade agreement did not abrogate the ASP *basis of valuation* established in Presidential Proclamation 2027; therefore, when petitioner imported the tennis shoes, there was "in effect under section 1336 * * * a rate of duty based upon the American selling price of a domestic article" 19 U.S.C. 1402(a).

These holdings are also supported by other considerations. First, the Japanese trade agreement explicitly provides that the basis specified in Presidential Proclamation 2027, *i.e.*, the ASP, is applicable to rubber-soled footwear. 6 U.S.T. at 5890, T.I.A.S. No. 3438 at 58, T.D. 53865, 90 Treas. Dec. at 256. Second, in amending the footwear tariff provision in 1954 and 1958, Congress twice ratified the use of ASP valuation (Pet. 56a-57a). The current footwear provision, enacted after the importations here in issue, expressly continues the ASP valuation. Schedule 7, T.S.U.S., headnote 3(b), Subpart A, Part 1,

19 U.S.C. 1202. Finally, the decisions below are consistent with the decision in *Albert F. Maurer Co.* v. *United States*, 47 Cust. Ct. 560, 575, Reap. Dec. 10130, affirmed, 50 Cust. Ct. 539, A.R.D. 153, affirmed, 51 C.C.P.A. 114, C.A.D. 845. For these reasons, as well as for the others relied upon by the courts below (Pet. 18a-19a, 20a, 54a, 56a, 57a), the "unbroken practice of the Executive, the Congress, and [the Customs Court]" required the courts below to reject petitioner's "debatable grammatical construction" (Pet. 58a) of the statutory provisions at issue.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 438483 25

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 24 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-288

No. 1855

A. ZERKOWITZ & CO. INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF OF THE FOOTWEAR GROUP, AMERICAN IMPORTERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

NOEL HEMMENDINGER
STITT, HEMMENDINGER & KENNEDY
Attorneys
1000 Connecticut Avenue
Washington, D.C. 20036

June 23, 1971

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1833

A. ZERKOWITZ & CO. INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF OF THE FOOTWEAR GROUP, AMERICAN IMPORTERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

This brief is submitted with consent of the parties on behalf of the Footwear Group of the American Importers Association, 420 Lexington Avenue, New York, New York 10017, as *amicus curiae* in support of the petition by the plaintiff below, A. Zerkowitz & Co. Inc., for certiorari to the Court of Customs and Patent Appeals.

The Footwear Group is an unincorporated association of 23 footwear importers, most of whom do presently and did

during the years 1958, 1959 and 1960 import rubber-soled footwear with fabric uppers, the appraisement of which for customs purposes would be controlled by the decision in the case at bar. Members have appeals pending in the Customs Court which constitute a substantial part of the 16,153 value cases,[1] referred to in the petition for certiorari, which are suspended pending the final decision in this case.

The Footwear Group operates under the general supervision of the American Importers Association, formerly the National Council of American Importers, an incorporated trade association, which is the oldest and most respected organization serving the interests of the import trade of the United States.

REASONS FOR GRANTING CERTIORARI

It is submitted that certiorari should be granted to determine whether the Court below correctly decided the question whether American Selling Price valuation of rubber-soled footwear instituted in 1933 pursuant to Section 336 of the Tariff Act of 1930, 19 U.S. Code § 1336, continued to be effective notwithstanding the enactment of Section 350 (a)(2)(a) of the Trade Agreements Act of 1934, 19 U.S. Code § 1352, and the subsequent execution of a trade agreement reducing the rate of duty.

This is an important question of federal law which has not been, but should be, settled by this Court.

Some background is required. The practical issue is whether the imported sneakers should have been appraised at 20 percent *ad valorem* on their own value, or on the selling price of a like or similar American made shoe, leading to a duty four or five times higher. The latter, known as

---

[1]The value of these entries is not known. The value of all imports of rubber-soled footwear with fabric uppers subject to ASP valuation in 1960, as reported by the U.S. Department of Commerce, was $37.6 million.

American Selling Price or ASP valuation, is an anomalous and controversial method of Customs valuation[2] which is found only in a limited part of the customs practice of the United States. It was introduced into the American law by the Fordney-McCumber Tariff of 1922 after a bitter debate.

The Fordney Bill which had been passed by the House of Representatives in 1921 adopted as the basic method of valuation for all imports the so-called "American" method, which had long been advocated by protectionists, because overt rates of over 100 percent on the value of the imports themselves were not acceptable. If they could raise the valuation rather than the rate, the object of high protection could be realized without calling so much attention to it.

The Senate rejected the American valuation principle, but it approved the so-called "flexible" or "scientific tariff" providing for duties to equalize the cost of production at home and abroad. When the Senate and House bills came to conference, ASP was made the statutory basis for appraisement of benzenoid chemicals; the "flexible" tariff was approved potentially for all imports through Tariff Commission action; and it was provided that if the Tariff Commission found that a duty increase of 50 percent would not equalize the costs of production at home and abroad, then ASP valuation should be adopted.[3]

American Selling Price valuation was applied by the Tariff Commission and the President only five times under Section 315 of the 1922 Act. One proclamation was held invalid

---

[2] It is contrary to Article VII of the General Agreement on Tariffs and Trade, T.I.A.S. No. 1700 (except for the saving clause for existing legislation), which provides that value should be based on the actual value of imported merchandise, or of like merchandise, not on the value of merchandise of national origin or arbitrary or fictitious values.

[3] See generally, R. Elberton Smith, Customs Valuation in the United States (1948).

for lack of adequate notice, and in the other four cases, the unusual method of valuation was dropped when Congress enacted the Tariff Act of 1930.

There have been only three cases resulting in ASP valuation under Section 336 of the Tariff Act of 1930, which reenacted Section 315 of the 1922 Act. Each of these is still in effect: rubber-soled and rubber footwear (T.D. 46158) (except that rubber-footwear was removed from ASP appraisement by P.L. 89-241 of 1965); canned clams (T.D. 47031); and certain wool knit gloves of an obsolete value bracket (T.D. 48183).

With the enactment of the Trade Agreements Act of 1934, a new chapter in American trade policy commenced. The idea of fixing tariffs to equalize the cost of production at home and abroad was abandoned. Instead, it became the policy of the United States to reduce tariffs through reciprocal negotiations. It was provided by Section 350(a)(2)(a), 19 U.S. Code § 1352, that Section 336 should be inapplicable to any article the rate of which was reduced in the course of trade negotiations. In such case, a different method of relief was opened to U.S. industries that might be affected adversely by increased imports, namely a petition to the Tariff Commission under Section 7 of the Trade Agreements Act of 1951 (prior to that by Presidential order), 19 U.S. Code § 1364 (superseded by § 301 of the Trade Expansion Act of 1962, 19 U.S. Code § 1901).

Section 336 was not repealed, presumably because it was the desire of the Congress to afford some method by which American industries which were adversely affected by imports could obtain relief even though the rate was unchanged by any trade agreement.

With respect to those cases in which Section 315 or Section 336 had been invoked to increase the rates of duty, those rates could be reduced through trade agreements, and in practically all cases this was done. Relief was available to a domestic industry affected through Section 7, and Sec-

tion 336 became inapplicable. Section 336(f) provides for the modification or termination of action taken to increase the tariff or change the basis of valuation, by a new application and under the same standards; this was of course superseded when a trade agreement was made.

Thus if the position of the Court below is sustained, the anomalous method of valuation which was intended by Congress to be subject to change by administrative action has become irrevocably fixed in the law, short of Congressional legislation. The sensible reading is that rates of duty and appraisement methods proclaimed under Section 336 all became suspended immediately upon the execution of a trade agreement by virtue of Section 350(a)(2)(a) of the Trade Agreements Act of 1934. Technically, this would have been true of rates of duty as well as method of valuation, but with respect to rates of duty the question is academic, because the trade agreement itself fixed a new rate of duty.

The 20 percent rate of duty on the value of the imports themselves, rather than ASP, put actual duties on rubber-soled footwear with fabric uppers in line with those on leather footwear originally provided for in paragraph 1530 (e) of the Tariff Act of 1930.

The case at bar involves the situation as presented by the entries of 1958, 1959 and 1960. Since then, the Congress enacted the Trade Expansion Act of 1962, under which the Kennedy Round of tariff negotiations was conducted. In this Round, agreements were made, subject to necessary Congressional legislation, to remove ASP valuation of chemicals, to which strong objection had been taken as a non-tariff trade barrier, and also of canned clams and wool knit gloves. The Congress has not yet acted upon these agreements. No agreement was entered into with respect to rubber-soled footwear. See House Report No. 91-1435, on H.R. 18970, 91st Cong., 2d Sess., page 52.

In 1963 the Tariff Schedules of the U.S. were revised, and Proclamation No. 2027 under Section 336 relating to

ASP duties on footwear became Headnote 3(b), Subpart A, Part I, Schedule 7 of the Tariff Schedules of the United States, 19 U.S. Code § 1202. Because of language changes, the decision in this case would not be determinative with respect to the method of valuation of imports of rubber-soled footwear with fabric uppers which are currently imported. The decision in this case would, however, lay the foundation for such a determination.

CONCLUSION

Certiorari should be granted to review the question whether ASP valuation was applicable, as a matter of law, to any imports of rubber-soled footwear during the years 1958, 1959 and 1960.

Respectfully submitted,

Noel Hemmendinger

Counsel for
The Footwear Group of the American Importers Association as *Amicus Curiae*

STITT, HEMMENDINGER & KENNEDY
Attorneys
1000 Connecticut Avenue
Washington, D.C. 20036